SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 934

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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2 In the United States District Court for the District of Columbia

Civil Action No. 26453

UEBERSEE FINANZ-KORPORATION, A. G. LIESTAL, SWITZERLAND, PLAINTIFF

v.

JAMES K. MARKHAM, AS ALIEN PROPERTY CUSTODIAN, DEFENDANT

Complaint

Filed Oct. 25, 1944

Plaintiff by its attorneys, complaining of the defendant, alleges:

1. This action arises under the Fifth Amendment to the Constitution of the United States and the Trading With The Enemy Act, Act of October 6, 1917, 40 Stat. 411, as amended; U. S. C. Title 50, Appendix Sections 1 to 31, inclusive, as hereinafter more fully appears.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

3. Plaintiff is a corporation organized in the year 1922 under the laws of the Confederation of Switzerland, has its principal office at Liestal, Switzerland, and is and always has been a citizen of Switzerland.

4. Plaintiff is not, nor at any of the times herein specified has been, an enemy or ally of enemy of the United States within the meaning of the Trading With The Enemy Act.

5. Plaintiff is not, nor at any of the times herein specified has been, a national of a designated enemy country.

6. On and prior to June 4, 1942, and continuously thereafter, plaintiff was and is the lawful owner of the following property:

(a) 345,760 shares of the common stock of Harvard Brewing Company (a Delaware Corporation), and all dividends
3 thereon since June 14th, 1942. (Described in Custodian's Vesting Order No. 17, dated June 14, 1942.)

(b) 73,039 shares of the common stock of Spur Distributing Company, Inc. (a Delaware Corporation), and all dividends thereon since June 14, 1942. (Described in Custodian's Vesting Order No. 14, dated June 14, 1942.)

(c) 100 shares of the common stock of Westminster Industrial Corporation (a New York corporation), and all dividends paid thereon since June 14, 1942. (Described in Custodian's Vesting Order No. 18, dated June 4, 1942.)

(d) 7,304 shares of the common stock of Ajax Transportation Company (a Missouri corporation), and all dividends thereon since June 30, 1942. (Described in Custodian's Vesting Order No. 36, dated June 30, 1942.)

(e) All right, title and interest of Uebersee Finanz-Korporation, A. G., (Overseas Finance Corporation, Limited) in and to that certain contract executed under the date of October 18, 1940 with Amerlagene, Inc., a Delaware corporation.

All income, profits and other property heretofore accrued or which may hereafter accrue to Uebersee Finanz-Korporation, A. G., (Overseas Finance Corporation, Limited) by virtue of the aforesaid contract dated October 18, 1940. (Described in Custodian's Vesting Order No. 51, dated July 11, 1942.)

(f) 300 shares of the common stock of Amerlagene, Inc., (a Delaware corporation) and all dividends thereon since June 4, 1942. (Described in Custodian's Vesting Order No. 19, dated June 4, 1942.)

7. On the following dates Leo T. Crowley, the predecessor in office of the defendant, caused to be executed the following numbered Vesting Orders respecting the property described in the indicated sub-sections of Paragraph 6, above:

Date	Vesting order No.	Description
6-14-42	17	See Paragraph 6 (a).
6-14-42	14	See Paragraph 6 (b).
6-4-42	18	See Paragraph 6 (c).
6-30-42	36	See Paragraph 6 (d).
7-11-42	51	See Paragraph 6 (e).
6-4-42	19	See Paragraph 6 (f).

8. Thereafter, in purported pursuance of said Vesting Orders the said Leo T. Crowley, without warrant of law and in violation of the Constitution of the United States, seized the property described in Paragraph 6 above, without the consent of the plaintiff.

9. At no time, at or since the dates mentioned in Paragraphs 7 and 8 above, has any of the property described in Paragraph 6 above, been owned, directly or indirectly, in whole or in part, by any person who was or is an enemy or ally of enemy within the meaning of the Trading With The Enemy Act.

10. At no time, at or since the dates mentioned in Paragraphs 7 and 8 above, has any of the property described in Paragraph 6 above, been owned, directly or indirectly, in whole or in part, by any person who was or is a national of a designated enemy country.

11. On May 27, 1943 plaintiff duly made and filed in triplicate with the defendant, a Notice of Claim with respect to the property described in Paragraph 6 above, in the form and containing the particulars required by the Alien Property Custodian.

12. Defendant and his predecessor have retained and defendant is now retaining the property described in Paragraph 6 hereof, without warrant of law and in violation of the Constitution of the United States.

Wherefore plaintiff demands:

(a) Judgment that it is entitled to the immediate possession of the property described in Paragraph 6 hereof.

(b) That a decree be entered directing the defendant to account for and deliver and transfer to plaintiff the property described in Paragraph 6 hereof, together with all dividends and avails thereof and all right, title and interest therein.

(c) Judgment for the costs of this action.

——— ———, *Plaintiff.*

By RICHARD J. CONNOR,
BART W. BUTLER,
Attorneys for Plaintiff,
821 15th Street NW., Washington 5, D. C.

* * * *

In United States District Court

Amendment to complaint

Filed Aug. 20, 1945

The Complaint in the above-entitled matter is hereby amended in the following particulars:

By amending Paragraph 7 to read as follows:

7. On the following dates Leo T. Crowley, the predecessor in office of the defendant, caused to be executed the following numbered Vesting Orders respecting the property described in the indicated sub-sections of Paragraph 6, above:

Date	Vesting Order No.	Description
6-14-42	17	See Paragraph 6 (a).
6-14-42	14	See Paragraph 6 (b).
6-4-42	18	See Paragraph 6 (c).
6-30-42	36	See Paragraph 6 (d).
7-11-42	51	See Paragraph 6 (e).
6-4-42	19	See Paragraph 6 (f).

and on August 6, 1942, issued an amendment of Vesting Order No. 17 and on July 11, 1944, the defendant issued an amendatory and supplemental order to Vesting Order No. 14.

By amending Paragraph 9 to read as follows:

9. At no time, at or since the dates mentioned in Paragraphs 6, 7 and 8 above, has any of the property described in

Paragraph 6 above, been owned or controlled, directly or indirectly, in whole or in part, by any person who was or is an enemy or ally of enemy within the meaning of the Trading with the Enemy Act.

By amending Paragraph 10 to read as follows:

10. At no time, at or since the dates mentioned in Paragraph 6, 7, and 8 above, has any of the property described in Paragraph 6 above, been owned or controlled, directly or indirectly, in whole or in part, by any person who was or is a national of a designated enemy country.

By adding a paragraph numbered 10 (a) reading as follows:

10 (a). At no time, at or since the dates mentioned in Paragraphs 6, 7 and 8 above, has any of the property described in Paragraph 6 above, directly or indirectly, in whole or in part, been owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of:

(i) An enemy or ally of enemy within the meaning of the Trading with the Enemy Act.

(ii) A designated enemy country within the meaning of the Trading with the Enemy Act or any executive orders issued pursuant thereto.

(iii) Any national of a designated enemy country within the meaning of the Trading with the Enemy Act or any executive orders issued pursuant thereto.

By adding a paragraph numbered 10 (b) reading as follows:

10 (b). At no time, at or since the dates mentioned in Paragraphs 6, 7 and 8 above, have any of the corporations whose names are stated in Paragraph 6 above been an enemy or ally of enemy within the meaning of the Trading with the Enemy Act or a national of a designated enemy country within the meaning of the Trading with the Enemy Act or any of the executive orders issued pursuant thereto.

7 By adding to the prayer for relief in said Complaint a subparagraph (d) reading as follows:

(d) Such other or further relief as is warranted in the premises.

* * * * * * *

In United States District Court,

Motion by defendant to dismiss the action

Filed Jan. 24, 1945

James E. Markham, Alien Property Custodian, the defendant in the above-entitled cause, moves the Court to dismiss the action herein because the complaint fails to state a claim upon which

relief can be granted inasmuch as it appears upon the face of the complaint that the plaintiff is a national of a foreign country whose property the Alien Property Custodian was authorized to vest under Section 5 (b) of the Trading with the Enemy Act, as amended by Title III of the First War Powers Act, 1941, and under Executive Orders 9095 and 9193.

HERBERT WECHSLER,
Assistant Attorney General,
HARRY LEROY JONES,
Chief, Alien Property Litigation Unit,
IRVING J. LEVY,
Chief Trial Attorney,
SAMUEL Z. GORDON,
Attorney,
War Division, Department of Justice,
Attorneys for Defendant.

JANUARY 24, 1945.

Of Counsel:
JOHN ERNEST ROE,
General Counsel to the Alien Property Custodian.

8 In United States District Court

Judgment

Filed Sept. 21, 1945

The defendant having moved the court to dismiss the motion herein on the ground that the complaint fails to state a claim upon which relief can be granted in that it appears upon the face of the complaint that the plaintiff was a national of a foreign country whose property the Alien Property Custodian was authorized to vest under Section 5 (b) of the Trading with the Enemy Act as amended by Title III of the First War Powers Act, 1941 and under Executive Orders Nos. 9095 and 9193, and said motion having come on to be heard before me on the 29th day of August, 1945, and after hearing counsel for both parties and due deliberation having been had herein, Now, therefore, it is

Ordered, Adjudged and Decreed that said motion is hereby granted and that the action herein be and it is hereby dismissed with costs to the defendant.

H. A. SCHWEINHAUT, *Justice.*

Dated September 21, 1945.

9 In United States Court of Appeals,
District of Columbia

Before Honorable D. Lawrence Groner, Chief Justice; Henry W. Edgerton, and E. Barrett Prettyman, Associate Justices

No. 9187, April Term, 1946

Uebersee Finanz Korporation, A. G., appellant

vs.

James E. Markham as Alien Property Custodian, appellee

Minute entry

May 28, 1946

Argument commenced by Mr. Richard J. Connor, attorney for appellant, continued by Mr. Herbert Wechsler, attorney for appellee, and concluded by Mr. Richard J. Connor.

10 [File endorsement omitted.]

In United States Court of Appeals, District of Columbia

No. 9187

Uebersee Finanz-Korporation, A. G., appellant

v.

James E. Markham, as Alien Property Custodian, appellee

Appeal from the District Court of the United States for the District of Columbia

Argued May 28, 1946—Decided October 21, 1946

Mr. Richard J. Connor, with whom Mr. Bart W. Butler was on the brief, for appellant.

Mr. Herbert Wechsler, Special Assistant to the Attorney General, with whom Mr. Harry LeRoy Jones, Special Assistant to the Attorney General, was on the brief, for appellee. Mr. Wallace H. Walker, Department of Justice, also entered an appearance for appellee.

Before GRONER, C. J., and EDGERTON, and PRETTYMAN, JJ.

Opinion

Filed Oct. 21, 1946

GRONER, C. J.: The decision in this case turns upon the question whether the amendment of § 5 (b) of the Trading with the Enemy Act by Title III of the First War Powers Act of 1941 has, by necessary implication, the effect of nullifying and rendering impotent § 9 (a) of the original Act.[1] Or, stated more concisely, whether the amendment of § 5 (b) in 1941, of itself and without more, renders inoperative the rights conferred under § 9 (a) of the original Act.

Appellant is a corporate national of Switzerland and at the outbreak of World War II was the owner of certificates of stock in sundry American corporations. The Alien Property Custodian, under authority of amendment § 5 (b) and under Executive Orders 9095 and 9193, seized appellant's property as the property of a "foreign country or national thereof" and vested the same in himself. Since precisely this procedure is authorized under that section, obviously no exception can be had to this. But at that point appellant, claiming the right to recover the vested property under the provisions of § 9 (a) of the Act, brought this suit, alleging, among other things, that before and at the time of the seizure it was a citizen of Switzerland; that it was not an enemy or ally of enemy; that it was not a "national of a designated enemy country"; and that the property was not then nor at any other time held for the benefit of an enemy or ally of enemy, nor for the benefit of a "national of a designated enemy country."

The Custodian filed a motion to dismiss on the ground that the complaint failed to state a valid cause of action, and the District Court, without opinion, granted the motion. From that action this appeal is taken.

The basis of the motion to dismiss is that it appears on the face of the complaint that appellant is a national of a foreign country

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[1] 50 U. S. C. War App. § 9 (a), 41 Stat. 977, provides: "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property * * * conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him * * * may institute a suit in equity * * * in the district court of the United States * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

50 U. S. C. Supp. V, War Apps., § 616, 55 Stat. 839, 840, amending § 5 (b) of the Trading with the Enemy Act, provides: "During the time of war * * * any property or interest of *any foreign country or national thereof* shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States. * * *." [Italics supplied.]

land, this being conceded, the Custodian insisted and now insists that under the amended § 5 (b) the vesting is absolute and not subject to attack.[2] To avoid conflict with the constitutional prohibition against the taking of property of friendly aliens without just compensation, which such a construction would raise, the Custodian suggests that appellant may obtain just compensation by way of suit against the United States in the Court of Claims. But that suggestion conflicts with § 7 (c) of the Act,[3] which provides—"The sole relief and remedy of any person having any claim to any money or other property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act," i. e., § 9 (a). Thus appellant's right of recovery, if it has any, is limited by statutory terms to a suit under § 9 (a), for only to that extent and in that manner has the United States consented to be sued. Pflueger v. United States, 73 App. D. C. 364, 121 F. (2d) 732, *cert. den.* 314 U. S. 617; Sigg-Fehr v. White, 52 App. D. C. 215, 285 Fed. 949.

12 It will thus be seen that the Custodian's position is not only that the vesting of the property is within the authority delegated to him—which is not denied—but also that § 9 (a) of the Act, which specifically confers jurisdiction on the several district courts to entertain a proceeding to inquire into the question whether the seized property is owned by "an enemy or ally of enemy," and if not so owned, to order its return, is, since the passage of the amendment to § 5 (b), inapplicable in the case of property owned by any foreign national which has been seized by the Custodian.

The Custodian attempts to avoid the stark obliteration from § 9 (a) of the words "Any person not an enemy or ally of enemy", by saying that that section limits recovery to "the interest therein" of the claimant, and accordingly the Custodian insists there may be no recovery here because seizure under amended § 5 (b) destroys all interests of aliens in seized property. But there is nothing in § 5 (b) to sustain this view and to adopt it would read into that section words that are not there and at the same time, and with just as little warrant, read out the quoted words from § 9 (a). This

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[2] The language of amended § 5 (b) as to vesting is—"Such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." And the position of the Custodian is that this language vests the property in the Custodian unqualifiedly and completely. The language used is broad, but it is no broader than the language used in the vesting provision of the original Act (Act of March 28, 1918, amending § 12 c. 28, 40 Stat. at L. 459-460), wherein the Custodian was given the power to sell and manage such property as though he were the absolute owner. But on a similar claim under that provision the Supreme Court, in Central Union Trust Co. v. Garvan, *infra*, said:

"All this may be conceded if no claim is filed. But this act did not repeal § 9, which is amended by the later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result."

[3] 50 U. S. C. War App. § 7 (c).

assumes, we think, too much. In any event, to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do. See Becker Steel Co. v. Cummings, 296 U. S. 74; Stoehr v. Wallace, 255 U. S. 239; Central Union Trust Co. v. Garvan, 254 U. S. 554. In our view, what was said by the Supreme Court in the recent case of Markham v. Cabell, 326 U. S. 404, is conclusive against such action. In that case, as in this, the Custodian contended that the amendment to § 5 (b) armed the Executive with far more comprehensive powers over enemy property and the property of other foreign interests, including friendly and allied interests, than in World War I, and that the effect of this was to withdraw the right to sue explicitly granted by § 9 (a) should not be read out of the law. The Supreme Court said:[1] "We can find no indication in the 1941 legislation that Congress by amending § 5 (b) desired to delete or wholly nullify § 9 (a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

Read as we read them, § 5 (b) as amended and § 9 (a) do not conflict, but rather constitute a reasonable program to meet the emergency of war. Under the Act as it was in World War I, the seizure of alien property was limited to that of enemies, and the seizure was "after investigation." Thus, a determination of enemy ownership was a prerequisite to seizure.[2] A more expeditious procedure to assure quick protection of our economy against enemy influence was to seize initially all alien property, and then upon investigation and with the burden of producing the facts placed upon the claimant rather than upon the Custodian, to return the property of aliens not enemies. Amended § 5 (b) and § 9 (a) when read together, prescribe exactly that procedure.

The amendment of § 5 (b) did not nullify § 9 (a), nor was it inconsistent therewith. Indeed, it seems to us that the haste imposed by war required additional assurance against unwarranted seizure.

We have found nothing and reason suggests nothing to indicate that the dominant purpose of the Act—the elimination of enemy influence in our economy—has been changed, or that the calamity of war was to be used to eliminate and destroy all alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of

[1] 326 U. S. 404–411.

[2] The Custodian says that a summary determination was sufficient. Whether summary or not, the statute made the investigation a preliminary and not a subsequent step to seizure.

dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of § 5 (b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest. And that this is true is definitely shown, we think, in the fact that Congress has twice refused to write the Custodian's present construction into the law.[8] But even if that conjecture be dismissed, there is nothing to support the theory of the Custodian that the new legislation eliminated all remedy as to all foreign rights. For obviously, such a purpose would run headlong into constitutional objection.

Accordingly, it seems to us quite clear that neither the language of the amendments nor the policy of Congress, as shown by the revised legislation, contemplated the position taken by the Custodian here.[8] It follows, therefore, that the judgment below must be reversed and the case remanded for trial in accordance with the views expressed in this opinion.

Reversed and Remanded.

Dissenting opinion

EDGERTON, J., dissenting: Section 9 (a) still gives a remedy, as it always did, against unauthorized takings of property. But taking the property of a friendly alien is now expressly authorized by § 5 (b). As the court concedes, the property in suit "vested" in the Custodian. The vesting for which § 5 (b) provides is unqualified and complete. The property may be "used, * * * sold, or otherwise dealt with" by the Custodian. This precludes retention by appellant of any interest in the property.

The policy of § 5 (b) is clear. Nominal ownership by nominal neutrals is often a front for, or otherwise equivalent to, enemy control. Such arrangements are often hard to detect and usually harder to prove. To defeat them, Congress authorized the Custodian to vest in himself the property of any foreign national. It does not appear that they can be defeated otherwise.

I do not understand how § 9 (a) can be thought to give appellant a claim to recover property which is no longer his. The court states that § 9 (a) specifically confers jurisdiction to inquire whether seized property is owned by an enemy or ally of enemy, and if not so owned, to order its return. I cannot find this provision in § 9 (a). What this section, as I read it, specifically confers is jurisdiction to award to a claimant whose "interest" or "title" is "established * * * the * * * property * * * or the

[8] H. R. 4840, 78th Cong. 2nd Sess. (died in Committee). H. R. 5089, 79th Cong. 2nd Sess. (reintroduced as H. R. 6890, 79th Cong. 2nd Sess.), contained in § 33 provision that "a foreign * * * national * * * may not * * * maintain a suit pursuant to 9 (a) hereof." This section, together with an identical section contained in S. 2378, 79th Cong. 2nd Sess., was deleted and the remainder of the bill was passed.

interest therein to which the court shall determine said claimant is entitled." Appellant has no interest or title in the property in suit, since the property is vested unqualifiedly in the Custodian.

14 Compensation for the taking of the property is a different matter. The Tucker Act, 28 U. S. C. § 250, permits recovery in the Court of Claims on any claim "founded upon the Constitution of the United States or any law of Congress * * * [or] upon any contract, express or implied, with the Government of the United States * * *." And "it is settled by many decisions of which we need only cite the last—Yearsley v. Ross, 309 U. S. 18—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly promises to pay just compensation, and that that promise is 'just compensation' under the Fifth Amendment." Silesian-American Corp. v. Markham (C. C. A. 2d; decided July 3, 1946). The former owner's claim to compensation is not affected by the provision in § 7 (c) that "the sole relief and remedy of any person having any claim to any money or other property * * * transferred" shall be that provided by the Act, since a claim to compensation for the taking of property is not a claim to the property. Accordingly I see no constitutional difficulty in the statutory scheme.

15 In United States Court of Appeals for the District of Columbia

[File endorsement omitted.]

No. 9187—October Term, 1946

UEBERSEE FINANZ-KORPORATION, A. G., APPELLANT

vs.

JAMES E. MARKHAM AS ALIEN PROPERTY CUSTODIAN, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

Judgment

Filed Oct. 21, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from this cause be, and the same is hereby, reversed and

that this cause be, and it is hereby, remanded to the said District Court for trial in accordance with the views expressed in the opinion of this Court.

Per Mr. Chief Justice GRONER.

Dated October 21, 1946.

Dissenting opinion by Mr. Justice EDGERTON.

19 United States Court of Appeals for the District of Columbia

[Title omitted.]

Order substituting party appellee

Filed Nov. 30, 1946

On consideration of the motion of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, to substitute himself in the place and stead of appellee James E. Markham, as Alien Property Custodian, on the ground that effective October 15, 1946, the President of the United States terminated the Office of Alien Property Custodian and transferred its functions to the Attorney General, and the Attorney General having represented that there is substantial need for continuing the action and obtaining a final adjudication therein, and it appearing that appellee James E. Markham and appellant Uebersee Finanz-Korporation, A. G., consent to the motion to substitute, It is

Ordered by the Court that Tom C. Clark, Attorney General of the United States, be, and he is hereby, substituted as appellee in the place and stead of appellee James E. Markham, as Alien Property Custodian.

PER CURIAM.

Dated November 30, 1946.

[File endorsement omitted.]

21 [Clerk's certificate to foregoing transcript omitted in printing.]

22 Supreme Court of the United States

No. 934—October Term, 1946

Order allowing certiorari

Filed February 17, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE : 1947

FILE COPY

Supreme Court, U. S.
FILED
JAN 20 1947
CHARLES ELMORE CROPLEY

No. 934

In the Supreme Court of the United States

OCTOBER TERM, 1946

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Sec. 9 (a) — 4, 11, 12, 15, 20, 24
Sec. 32 — 26
Tucker Act, Judicial Code §§ 24 (20), 145 (1), 28 U. S. C. 41 (20), 250 (1) — 13, 29, 30
Executive Order No. 8785, June 14, 1941, 6 F. R. 2897 — 3

Miscellaneous:
Annual Report, Office of Alien Property Custodian, March 11, 1942, to June 30, 1943 — 10
92 Cong. Rec. A–4805 — 19
Hearings before a Subcommittee of the Senate Committee on Military Affairs (Kilgore Committee) pursuant to S. Res. 107 and 146, 79th Cong., 1st Sess., June–Dec., 1945 — 7
H. Rep. No. 1507, 77th Cong., 1st Sess. (1941) — 7
H. Rep. No. 2398, 79th Cong., 2d Sess. (1946) — 8, 19
S. Rep. No. 911, 77th Cong., 1st Sess. (1941) — 6
S. Rep. No. 1839, 79th Cong., 2d Sess. (1946) — 19
United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942) — 7
Vesting Orders:
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Amendatory and Supplemental Order No. 1 to Vesting Order No. 14, July 11, 1944, 9 F. R. 8083 — 2, 8
No. 17, June 4, 1942, 7 F. R. 4402, amended August 6, 1942, 7 F. R. 6199 — 2
No. 18, June 4, 1942, 7 F. R. 4402 — 2
No. 19, June 4, 1942, 7 F. R. 4403 — 2
No. 36, June 30, 1942, 7 F. R. 5078 — 2
No. 51, July 10, 1942, 7 F. R. 6503 — 2, 8

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. —

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Acting Solicitor General, on behalf of Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia entered in the above-entitled case on October 21, 1946.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia (R. 10) has not yet been reported. The district court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on October 21,

1946 (R. 15). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a suit under Section 9 (a) of the Trading With the Enemy Act, as amended, a "foreign national," within the meaning of Section 5 (b) of that Act, may secure the return of property vested by the Alien Property Custodian.

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended by the First War Powers Act, 1941, are set forth in the Appendix, *infra*, pp. 21–30.

STATEMENT

By a series of vesting orders issued in June and July 1942, the Alien Property Custodian vested in himself certain shares of stock and interests in contracts.[1] On October 25, 1944, Uebersee Finanz-Korporation, A. G., filed in the District Court for the District of Columbia its complaint under Section 9 (a) of the Trading With the Enemy Act, asserting that at the time

[1] The vesting orders are: Vesting Order No. 14, June 4, 1942, 7 F. R. 4399; Amendatory and Supplemental Order No. 1 to Vesting Order No. 14, July 11, 1944, 9 F. R. 8083; Vesting Order No. 17, June 4, 1942, 7 F. R. 4402, amended August 6, 1942, 7 F. R. 6199; Vesting Order No. 18, June 4, 1942, 7 F. R. 4402; Vesting Order No. 19, June 4, 1942, 7 F. R. 4403; Vesting Order No. 36, June 30, 1942, 7 F. R. 5078; Vesting Order No. 51, July 10, 1942, 7 F. R. 6503.

of vesting it was the owner of the vested properties and praying for their return (R. 2). The complaint alleged that the plaintiff was a corporation organized under the laws of Switzerland and a citizen of Switzerland; it denied that the plaintiff was either an "enemy" or "ally of enemy" within the meaning of the Trading With the Enemy Act (R. 6). The defendant moved to dismiss the complaint on the ground that it showed on its face that the plaintiff was a foreign national whose property the Alien Property Custodian was authorized to vest by Section 5 (b) of the Trading With the Enemy Act, as amended (R. 7). The district court granted the motion and dismissed the action (R. 8). The Court of Appeals for the District of Columbia, one judge dissenting, reversed and remanded the cause for trial, holding that Section 5 (b) did not authorize the retention of property of foreign nationals, but merely the initial vesting of such property subject to a duty to return upon suit by anyone not an enemy or ally of enemy, and that unless Section 5 (b) were so construed "grave doubts as to the constitutionality of the law" would arise (R. 10).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that Section 5 (b) of the Trading With the Enemy Act, as amended, did not

authorize the retention and use in the interest of the United States of property of a national of a foreign country vested by the Alien Property Custodian;

2. In holding that the amendments made to Section 5 (b) by the First War Powers Act, 1941, were designed merely to eliminate the procedural requirements of an investigation and finding of enemy ownership as a preliminary to seizure, and had no substantive effect on the type of property subjected to seizure and retention;

3. In holding that a foreign national whose property has been vested might not bring a suit for just compensation and thereby secure full protection of any constitutional rights;

4. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. As it existed during World War I, Section 7 (c) of the Trading With the Enemy Act, 40 Stat. 411, 418, as amended, 50 U. S. C. App. 7 (c), authorized the seizure of property of "an enemy or ally of enemy." It further provided that "the sole relief and remedy of any person having any claim to any money or other property" transferred to or seized by the Custodian "shall be that provided by the terms of this Act." Section 9 (a) of the Act, 40 Stat. 419, as amended, 50 U. S. C. App. 9 (a), authorized "any person not an enemy or ally of enemy" to bring a suit in

equity to "establish any right, title or interest which he may have" in any property held by the Alien Property Custodian. If he established such an interest, the court was directed to order the payment or transfer to him of the "money or other property * * * or the interest therein to which the court shall determine said claimant is entitled."

By the First War Powers Act, c. 593, 55 Stat. 838, 50 U. S. C. App. (Supp. V) 5 (b), enacted on December 18, 1941, Congress amended Section 5 (b) of the Trading With the Enemy Act, so as to authorize the vesting of "any property or interest of *any foreign country or national thereof*" [italics supplied] and provided that the property so vested should be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." This enlargement of the type of property subject to the vesting power from "enemy" property to "foreign" property was accompanied by no amendments addressed to the remedies provided by the Act, Congress leaving Sections 7 (c) and 9 (a) unchanged.

The 1941 amendment to Section 5 (b), adopted a few days after the entry of the United States into the war, thus worked a substantive enlargement of the seizure power. The court below has conceded that in using the phrase "any foreign country or national thereof" Congress subjected

to seizure all foreign property and not merely property of enemies or allies of enemies. (R. 11).[2] And in directing that any property vested from a foreign country or national thereof be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States," Congress plainly authorized that such property be retained by the Custodian and be made available for affirmative use in the national interest. *Markham* v. *Cabell*, 326 U. S. 404, 412. This purpose was expressly stated in both of the Committee Reports accompanying the bill which amended Section 5 (b). Thus it was stated in S. Rep. No. 911, 77th Cong., 1st Sess., p. 2, that:

> The existing foreign property control regulations (popularly known as "freezing control") have permitted the Government to prevent and regulate transactions relating to foreign property which are prejudicial to the interests of the United States. While existing law permits the

[2] This concession was required by the plain and natural meaning of the phrase; by the use of the phrase but a few lines earlier in the amendment to Section 5 (b) to define regulatory powers which could not conceivably be construed as being limited to enemy or ally of enemy property; and by the well-known use of the substantially identical phrase "any foreign state or a national thereof" in the Public Resolution of May 7, 1940, 54 Stat. 179, under the authority of which the property of thirty-four foreign countries and their nationals had been subjected to "freezing" controls at the time of passage of the First War Powers Act, 1941 (see Executive Order No. 8785, June 14, 1941, 6 F. R. 2897).

> Government to prevent transactions, *it is now necessary for the Government to be able to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States.* [Italics supplied].

To the same effect see H. Rep. No. 1507, 77th Cong., 1st Sess., p. 3.

There were strong reasons why the Congress, desiring to confer "a flexibility of control" and to avoid "the rigidity and inflexibility which characterized the alien property custodian law enacted during the last war" (H. Rep. No. 1507, 77th Cong., 1st Sess., p. 3), should have deemed inadequate a vesting power limited to property which could be proved to be owned by enemies or allies of enemies, as those terms were defined in the 1917 Act. When the First War Powers Act, 1941, was enacted, it was notorious that Germany and other Axis countries had developed a multitude of techniques for concealing actual enemy ownership of ostensibly neutral property, and for exercising control of property which was not enemy owned through such means as options, contractual relationships, control of vital technical information, and loyalty of key personnel. See United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), 29–31; Hearings before a Subcommittee of the Senate Committee on Military Affairs (Kilgore

Committee) pursuant to S. Res. 107 and 146, 79th Cong., 1st Sess., June–Dec., 1945, *passim*. Since the definitions of "enemy" and "ally of enemy" (see Appendix, pp. 21–22, *infra*) in the 1917 Act were too narrow to comprehend all persons engaged in such cloaking activities, Congress had good grounds for extending the vesting power as it did in order to avert all possibility of establishing an immunity, on technical grounds, for property of disguised or indirect hostile ownership. Compare *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, with *Draeger Shipping Co.* v. *Crowley*, 55 F. Supp. 906 (S. D. N. Y.).

Moreover, in granting the power to vest the property of all foreign nationals, Congress did not make the exercise of that power mandatory. In practice, the Custodian has in general exercised the vesting power only where, as in this case,[1] he had reason to believe that the property was enemy owned or controlled, or where the vesting was deemed advisable to conserve the property of a resident of enemy-occupied territory. See H. Rep. No. 2398, 79th Cong., 2d Sess., p. 4. Where that belief is shown to be unfounded or the reasons which motivated the vesting have disappeared, the Custodian is now empowered, as a result of the recent enactment of Pub. L. No.

[1] The Custodian has found that the respondent, although ostensibly neutral, was controlled by Germans. See Vesting Order No. 51 and Amendatory and Supplemental Order No. 1 to Vesting Order No. 14, *supra*, note 1.

322, 79th Cong., 2d Sess., March 8, 1946, to return the property, upon a finding that return is in the interest of the United States. See Appendix, pp. 26–29, *infra*. To go farther, however, as did the Court of Appeals in this case, and compel return if the property is not found to be enemy property within the definition of the 1917 Act, even though return is determined by the Executive Branch not to be in the public interest, would destroy the flexibility which Congress deemed necessary to meet the conditions of this war, and would thus negate the major substantive change in the vesting power which Congress plainly intended to enact.*

In an effort to avoid nullification of the 1941 amendment, the Court of Appeals has imputed to it a procedural function designed in the Court's view to facilitate prompt immobilization of all property possibly owned by enemies. The Court suggests that under Section 7 (c), property could be seized only "after investigation" and upon a finding of enemy ownership, and that Section 5 (b) had the effect of eliminating these requirements as a prerequisite to the initial vesting, while leaving the property subject to a duty to return upon a showing that it was not enemy

* Denial to a foreign national of the right to compel return by suit under Section 9 (a) does not leave him remediless in respect of any rights he may have under the Constitution. To the extent that the Constitution requires it, relief of complete adequacy is available by suit for just compensation under the Tucker Act. See pp. 13–16, *infra*.

owned. There is no suggestion in the entire statutory history of the First War Powers Act that Congress was concerned with these procedural requirements of an investigation and a formal finding of the facts. Nor is there anything in the history of the Trading With the Enemy Act as applied during and after the first World War to suggest that either requirement imposed a serious administrative burden calling for Congressional alleviation.[6] And, in any event,

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[6] The courts have emphasized that Section 7 (c) authorized the seizure, upon a summary ex parte determination, of property which was "supposed" or "believed" to be enemy owned. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51; *Yakus* v. *United States*, 321 U. S. 414, 443. In proceedings to enforce the Custodian's demand that property be transferred to him, his recital that an investigation had been made was conclusive and his findings were unreviewable. *Garvan* v. *Commercial Trust Co.*, 275 Fed. 841, 844 (D. N. J.), affirmed, *sub nom. Commercial Trust Co.* v. *Miller*, 281 Fed. 804 (C. C. A. 3), affirmed, 262 U. S. 51. *Cf.* 262 U. S. at 55. Nor did the character of his investigation and the evidentiary support for his findings assume any significance in a suit under Section 9 (a). The courts had held rather that the decision in such a suit was "unembarrassed by the precedent executive determination." *Stoehr* v. *Wallace*, *supra*, 246; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 53.

In fact the Custodian has not thought it important to escape either the requirement of investigation or of findings. See Annual Report, Office of Alien Property Custodian, March 11, 1942, to June 30, 1943, p. 22. His vesting orders typically recite the fact of an investigation and contain detailed findings of the ownership of the property by a national of either a foreign country or a designated enemy country. See, e. g., the vesting orders involved in this suit, note 1, *supra*.

if the Congressional purpose had been merely to ensure the prompt immobilization of all foreign property pending judicial determination of non-enemy ownership, the vesting provision of Section 5 (b) would have been superfluous, for such immobilization of foreign property could be fully accomplished through exercise of the freezing controls conferred by other provisions of Section 5 (b).

2. The Court of Appeals thought that such a nugatory construction of Section 5 (b) was required in order to avoid internal conflict with Section 9 (a), which authorizes "any person, not an enemy, or ally of enemy" to bring suit to establish his title to property held by the Custodian. If it were impossible to reconcile this provision of Section 9 (a) with the policy of Section 5 (b), Section 5 (b) as the later enactment should be controlling, and Section 9 (a) should be deemed to have been repealed to the extent necessary to give effect to the more recent expression of Congressional purpose. But we think there is no such collision. Section 9 (a) authorizes the court to order return only of that property to which it "shall determine said claimant is entitled." Since Section 5 (b) expressly authorizes the vesting and retention of property of a national of a foreign country, and the Custodian's act of vesting operates to cut off the title of a foreign national in the vested property (*cf. Cummings* v. *Deutsche Bank*, 300 U. S. 115,

120–121), such a national would thus be unable to "establish any right, title or interest" in the property and would not be "entitled" to have it returned. See *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C. C. A. 2), certiorari denied, No. 346, this Term, October 14, 1946. Hence if the language of Section 9 (a) limiting returns to property to which the claimant is "entitled" is read naturally and with regard for its organic relationship to Section 5 (b), it bars a court of equity from returning the property to a foreign national.

Thus construed, Section 9 (a) continues to perform the function for which it was designed when first enacted during World War I—that of affording a judicial determination of whether the property seized in a particular case was the type whose seizure and retention Congress had authorized. During World War I the authority granted was limited to enemy property. With its expansion to include foreign property by the 1941 amendments to Section 5 (b), there necessarily followed a corresponding narrowing of the type of property which could be returned by court order pursuant to Section 9 (a) because not within the scope of the stated seizure power. To construe Section 9 (a) as the complement of the stated seizure power, so that as the latter is enlarged the class of property which may be recovered is narrowed, is not to "nullify" Section 9 (a) as the Court of Appeals suggests, but is

rather to give Section 9 (a) the scope which a due regard for its historic function in the scheme of the Act compels.

3. The Court of Appeals also deemed its interpretation of Section 5 (b) to be compelled in order to avoid "grave constitutional doubts." These doubts are, however, created by the Court; they arise only because of its holding that the remedy of Section 9 (a) is exclusive so that to deny it to foreign nationals would leave them without remedy. Ordinarily, the remedy of a suit for just compensation under the Tucker Act, Judicial Code §§ 24 (20), 145 (1), 28 U. S. C. 41 (20), 250 (1), is available to redress an *authorized* taking of property which is protected by the Fifth Amendment from uncompensated seizure. Such a taking is normally deemed to give rise to an implied promise of compensation upon which an action may be brought against the Government. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, and cases cited. *Cf. Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79–80. The reasons which led the Court of Appeals to conclude that that remedy was not available here are not so compelling as to warrant a construction of the Act which denies all force to the substantive change intended by Congress in amending Section 5 (b).

The Court of Appeals rested its decision on this point on a provision of Section 7 (c) that "the

sole relief and remedy of any person having any claim to any money or other property" transferred to or seized by the Custodian "shall be that provided by the terms of this Act," and on certain decisions under the Act as it existed in World War I. This provision of Section 7 (c) appears on its face to be inapplicable to the claim of a foreign national for just compensation. Such a claim necessarily proceeds on the assumption that full and indefeasible title to the money or other property has passed to the United States, for only thus can the claimant show the "taking" which is the basis of his suit. It is therefore not a claim "to any money or other property" in the Custodian's hands, but a claim for pecuniary redress based on the premise that the specific money or property is beyond the reach of the claimant. For similar reasons, the decisions under the old Act that just compensation might not be recovered in the circumstances there presented (*Becker Steel Co.* v. *Cummings*, 95 F. 2d 319 (C. C. A. 2); *Pflueger* v. *United States*, 121 F. 2d 732, (App. D. C.) certiorari denied, 314 U. S. 617; *Escher* v. *United States*, 68 C. Cls. 473, certiorori denied, 281 U. S. 752) have little relevance. In all of those cases, the claimant could have, and in fact had, secured the return of his property or its proceeds by a proceeding under Section 9 (a); in denying additional relief

by way of just compensation they held in effect merely that the United States could not be regarded as the purchaser of property which it had returned, nor held liable as in tort for a purely possessory taking of property which the claimant could have recovered at any time by bringing suit under Section 9 (a). These decisions and the quoted provision of Section 7 (c) thus relate to property whose seizure and ultimate retention was not authorized by the Act, and for whose recovery an express statutory remedy was provided. Nothing in them would appear to preclude resort to the normal remedy, whenever the Constitution so requires, of a suit for just compensation to redress an authorized taking by the United States for which no other remedy is available.

Even if the compulsions of the language were clearer and Section 7 (c) had to be read as barring all remedy other than that of Section 9 (a), any resulting constitutional difficulties should be resolved in the manner which permits fullest realization of the purposes which Congress embodied in the First War Powers Act. This may be done by applying the normal presumption that Congress intended its declared policy to be effective (*cf. United States* v. *Powers*, 307 U. S. 214, 217; *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 255, 258), and by regarding Section 7 (c) as modified by Section 5 (b) to the extent necessary

to permit effectuation of the policy of the later-enacted Section.

4. The decision of the Court of Appeals is the first decision of an appellate court on the right of a foreign national to recover vested property by suit under Section 9 (a). The Circuit Court of Appeals for the Second Circuit has, however, squarely rejected one of the premises on which the opinion of the Court of Appeals in this case was based—the premise that to construe the Act as denying the remedy of return to a foreign national "would raise grave constitutional doubts." In *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797, certiorari denied, No. 346, this Term, October 14, 1946, the Circuit Court of Appeals for the Second Circuit held that a foreign national, if denied the remedy of return, could fully protect any constitutionally protected rights by a suit for just compensation. Judge Learned Hand, who spoke for the Court, therefore concluded that the Act was constitutional whichever view be adopted of the rights of a foreign national under Section 9 (a).

The decision of the Court of Appeals is in direct conflict with the decisions of two district courts, in addition to the District Court for the District of Columbia, that a foreign national may not recover under Section 9 (a). *Iki* v. *Crowley*, W. D. Wash., May 10, 1944, and on rehearing,

July 10, 1944;* *Hayden* v. *Crowley*, W. D. Wash., May 10, 1944, and on rehearing, July 10, 1944;* *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215, 219, 55 F. Supp. 906, 912–13, 914 (S. D. N. Y.). And in the *Silesian-American* case, *supra*, the Circuit Court of Appeals for the Second Circuit, although not expressly passing on the point, indicated its view that the result of the amendment to Section 5 (b) "may well be" to deny to a foreign national the remedy of return.

The holding of the Court of Appeals that the 1941 amendment to Section 5 (b) had only the narrow procedural function of eliminating the requirements of investigation and finding of enemy ownership as a prerequisite to the initial vesting, while leaving unaffected the duty to return to non-enemies, is inconsistent with the opin-

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* These cases were decided by Judge Black in identical unreported opinions. The opinion of Judge Black follows in full:

"After consideration of the very comprehensive briefs in behalf of each party which supplement the oral arguments which were submitted, and regardless of whether or not the complaint is or is not otherwise sufficient I am satisfied that it is essential and [sic] the plaintiff affirmatively allege that he is not a national of a foreign or enemy country. Such allegation is not now present.

"For such reason in any event the defendants' motion to dismiss should be granted.

"Order in harmony herewith may be presented, after notice.

"DATED May 10th, 1944."

ion of this Court in *Markham* v. *Cabell*, 326 U. S. 404. There this Court recognized that Section 5 (b) "gave a broader grant of authority to the Executive than had existed under the original Act," 326 U. S. at 411. Emphasizing the direction of Section 5 (b) that property vested from foreign nationals be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States," it spoke of "the new power granted the Executive by § 5 (b) to make any affirmative use of the property that the national interest in time of war might require," 326 U. S. at 412. This Court thus appears to have recognized that the 1941 amendment to Section 5 (b) effected a major substantive change in the Trading With the Enemy Act. And in sustaining the right of one who was neither an enemy nor a foreign national to recover a debt claim, it emphasized that that right was not "superseded by § 5 (b)" (326 U. S. at 413), because it was not "inconsistent with the new power granted the Executive by § 5 (b)" (326 U. S. at 412), and was "not shown to collide with § 5 (b)" (326 U. S. at 413). The opinion thus indicates that where such an inconsistency and such a collision does appear, it should be resolved, not by treating the later amendment as ineffective as the Court of Appeals has done in this case, but by giving full force to the clearly expressed policy of that amendment and treating

the older provisions of the Act as superseded to the extent necessary to avoid the collision.[1]

5. The question of the right of a foreign national to compel return of his property by a suit under Section 9 (a) is of fundamental importance in the administration of the Trading With the Enemy Act. It is presented in sixteen other pending suits relating to property of a value estimated at some 17 million dollars. In addition, resolution of the question will determine the course of a large number of claims to vested property which are anticipated but have not yet been filed. It is estimated by the Office of Alien Property that a total of some 86 mil-

[1] The Court of Appeals suggested (R. 13) that the recent failure of Congress to enact a proposed amendment to the Trading With the Enemy Act which would have expressly denied to foreign nationals the right of recovery by suit under Section 9 (a) indicated a Congressional intention to permit such recovery. The action of Congress in this respect does not support this conclusion. While the Report of the Senate Committee suggests that deletion of the proposed amendments from the bill which became Pub. L. No. 671, 79th Cong., 2d Sess., August 8, 1946, "preserved" the right of a friendly foreign national to recover his property by suit under Section 9 (a) (S. Rep. No. 1839, 79th Cong., 2d Sess., p. 2), the House Committee regarded the amendment as essentially declaratory of existing law, H. Rep. No. 2393, 79th Cong., 2d Sess., pp. 2–3, and Mr. Celler, Chairman of the House Subcommittee, in recommending the adoption of the bill as amended by the Senate, reiterated this view, stating that despite the deletion of the amendment, a foreign national could not under existing law secure judgment against the United States in a suit under Section 9 (a). 92 Cong. Rec. A–4805.

lion dollars worth of property may be affected by the decision.

If the decision below is sustained, the Government may be required to retain [8] all of this property pending the determination in protracted litigation of whether it is enemy owned. If it is reversed, the Government will be free to dispose of such property, while any constitutional rights will be protected by the availability of a suit for just compensation. As a result, a speedy reduction of the extent of the Government's custodial function and a return of a large number of important properties into the regular current of American business may be anticipated.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JANUARY 1947.

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[8] Section 9 (a) directs that the "money or property shall be retained in the custody of the Alien Property Custodian" pending the final outcome of the suit for return.

APPENDIX

Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

* * * * * *

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b)]:

* * * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

SEC. 9 (a) [as amended] That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district

court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Sec. 32 (as added by Pub. L. No. 322, 79th Cong., 2d Sess., Mar. 8, 1946):

(a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

(A) the government of a nation with which the United States has at any time since December 7, 1941, been at war; or

(B) a corporation or association organized under the laws of such nation: *Provided,* That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be returned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof) and if such ownership was by one or more citizens of the United States or by one or more corporations organized

under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further,* That such owner or owners shall succeed to those obligations, limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of a nation with which the United States has not at any time since December 7, 1941, been at war; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of a nation with which the United States has at any time since December 7, 1941, been at war, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory; or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided,* That notwithstanding the provisions of this subdivi-

sion (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section; and

(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89–96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

(5) that such return is in the interest of the United States.

Tucker Act, Judicial Code, § 24 (20), § 145 (1); 28 U. S. C. 41 (20), § 250 (1):

SEC. 24:

The district courts shall have original jurisdiction as follows:

* * * * *

(20) Suits against United States.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States * * *.

SEC. 145:

The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) Claims against United States.

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States * * *.

* * * * *

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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1946

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 934

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia (R. 7) is reported at 158 F. 2d 313. There was no opinion by the district court.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on October 21, 1946 (R. 11–12). The petition for a writ of certiorari was filed on January 20, 1947, and was granted on February 17, 1947 (R. 12). The jurisdiction of this Court rests on Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 5 (b) of the Trading With the Enemy Act, as amended by the First War Powers Act, 1941, provides that the President or his appointee may vest the property of "any foreign country or national thereof," and that such property may be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." Section 9 (*a*) of the Trading With the Enemy Act provides that "any person not an enemy or ally of enemy claiming any interest, right, or title" in property held by the Alien Property Custodian may bring suit in equity in any district court of the United States for the return of vested property; the court is authorized to direct the return only of the property or interest "to which the court shall determine said claimant is entitled."

The question presented is whether the Act as amended by the First War Powers Act, 1941, permits a foreign national, not an enemy or ally of enemy, whose property has been vested under Section 5 (b), to obtain, in a proceeding under Section 9 (a), a judgment requiring the return of such property.

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended by the First War

Powers Act, 1941, are set forth in Appendix A, *infra*, pp. 68–77.

STATEMENT

By a series of vesting orders issued in June and July, 1942, the Alien Property Custodian[1] vested in himself certain shares of stock and interests in contracts.[2] On October 25, 1944, Uebersee Finanz-Korporation, A. G., filed a complaint in the District Court for the District of Columbia, asserting that at the time of vesting it was the owner of the vested properties and praying that the Custodian be directed to return them (R. 1). The complaint alleged that the plaintiff was a corporation organized under the laws of Switzerland and a citizen of Switzerland; it denied that the plaintiff was either an "enemy," "ally of enemy," or "national of a designated enemy country" within the meaning of the Trading With the Enemy Act or Executive Orders

[1] The Office of Alien Property Custodian was created and authority to exercise powers under the Trading With the Enemy Act, as amended, were conferred upon the Custodian by Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, later amended by Executive Order No. 9193, July 6, 1942, 7 F. R. 5205. See Appendix A, *infra*, pp. 82–90. By Executive Order No. 9788, October 14, 1946, 11 F. R. 11981, the authority, rights, privileges, and powers of the Alien Property Custodian and of the Office of Alien Property Custodian were transferred to the Attorney General. In this brief, we shall use the term "Custodian" interchangeably to refer to the former Alien Property Custodian and to the Attorney General as successor to the Alien Property Custodian.

[2] The vesting orders are set out in Appendix C, *infra*, pp. 95–111.

issued pursuant to it (R. 3–4). The defendant moved to dismiss the complaint on the ground that it showed on its face that the plaintiff was a national of a foreign country, whose property the Alien Property Custodian was authorized to vest by Section 5 (b) of the Trading With the Enemy Act, as amended (R. 4).[3] The district court granted the motion and dismissed the action (R. 5). The Court of Appeals for the District of Columbia, one judge dissenting, reversed and remanded the cause for trial, holding that Section 5 (b) did not authorize the retention of property of foreign nationals, but merely the initial vesting of such property subject to a duty to return upon suit by anyone not an enemy or ally of enemy, and that unless Section 5 (b) were so construed "grave doubts as to the constitutionality of the law" would arise (R. 7–11).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

---

[3] Executive Order No. 8785, June 14, 1941, 6 F. R. 2897, designates Switzerland as a "foreign country" within the meaning of Section 5 (b) (Section 3 (j)), and defines "national" as including "any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country" (Section 5E (ii)). By Section 10 of Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, those definitions are made applicable to the vesting of property of foreign nationals by the Custodian.

1. In holding that Section 5 (b) of the Trading With the Enemy Act, as amended, did not authorize the retention and use in the interest of the United States of property of a national of a foreign country vested by the Alien Property Custodian;

2. In holding that the amendments made to Section 5 (b) by the First War Powers Act, 1941, were designed merely to eliminate the procedural requirements of an investigation and finding of enemy ownership as a preliminary to seizure, and had no substantive effect on the type of property subjected to seizure and retention;

3. In holding that a foreign national whose property has been vested might not bring a suit for just compensation and thereby secure full protection of any constitutional rights;

4. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

The First War Powers Act, 1941, by amendment to Section 5 (b) of the Trading With the Enemy Act, confers the power to vest "any property or interest of any foreign country or national thereof" and directs that "such interest or property" shall be held and used in the interest of, and for the benefit of, the United States. The text of this provision, its statutory setting, and its legislative history make it abundantly clear that Congress thereby conferred the power to take and to use in the interest of the United States

all foreign property and not merely enemy property. To allow a foreign national to compel the return of property which Congress has directed should be held and used in the national interest would not only defeat the purposes of the First War Powers Act, 1941, but would nullify its express terms.

It is settled that Section 5 (b) as thus amended should be read with the older provisions of the Trading With the Enemy Act "as parts of an integrated whole" to the extent that this can be done without defeating the purposes of the later enactment. *Markham* v. *Cabell*, 326 U. S. 404, 411. But we know of no principle of statutory construction which warranted the action of the court below in so applying the older provisions of the statute as to render ineffective the powers expressly granted by the later Congressional enactment. In any event, however, nothing in the provisions of Sections 9 (a) and 7 (c) of the Act, on which the court below relied, requires the result which the court reached. Read with textual precision and in the light of its historic function in the scheme of the Trading With the Enemy Act, neither provision interposes any obstacle to the construction of the Act, as amended in 1941, as denying to foreign nationals the right to recover vested property by suit under Section 9 (a) and as leaving available to such nationals the traditional remedy of a suit against the United States for the vindication of any consti-

tutional rights they may have to just compensation. As thus construed, the Act is plainly constitutional.

The construction advanced by the Custodian would not, as the respondent argued below, be inconsistent with the Treaty of 1850 with Switzerland. The treaty provisions relevant here have no application to the respondent since it is a corporation; but, in any event, the statutory and constitutional rights available to non-enemy foreign nationals fully satisfy the requirements of the treaty wherever applicable.

ARGUMENT

As it existed during World War I, Section 7 (c) of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1., *et seq.*, authorized the seizure of property of "an enemy or ally of enemy."[4] It further provided that "the sole relief and remedy of any person having any claim to any money or other property" transferred to or seized by the Custodian "shall be that provided by the terms of this Act." Section 9 (a) of the Act authorized "any person not an enemy or ally of enemy" to bring a suit in equity to "establish any right, title or interest which he may have" in any property held by the Alien Property Custodian. If the claimant established such an interest, the court was directed to

[4] Those terms are defined in Section 2 of the Act, Appendix A, *infra*, pp. 69–70.

order the payment or transfer to him of the "money or other property * * * or the interest therein to which the court shall determine said claimant is entitled."

By the First War Powers Act, c. 593, 55 Stat. 838, 50 U. S. C. App. (Supp. V) 5 (b), enacted on December 18, 1941, Congress amended Section 5 (b) of the Trading With the Enemy Act, so as to authorize the vesting of "any property or interest *of any foreign country or national thereof*" [italics supplied] and provided that the property so vested should be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." This enlargement of the type of property subject to the vesting power from "enemy" property to "foreign" property was accompanied by no amendments addressed to the remedies provided by the Act, Congress leaving Sections 7 (c) and 9 (a) unchanged.

On the pleadings, it is admitted that the respondent is a "national" of a "foreign country" as those terms have been defined pursuant to Section 5 (b). The case thus presents the single issue whether, in view of the express grant to the Executive by the First War Powers Act, 1941, of power to vest, retain, and use the property of any national of a foreign country, one who is such a national of a foreign country may recover vested property by suit under Section 9 (a). We submit that to allow recovery in such a case, as the court

below has done, would nullify the broad powers which Congress conferred by the First War Powers Act.

I

SECTION 5 (b) OF THE TRADING WITH THE ENEMY ACT CONFERS UPON THE UNITED STATES THE POWER NOT ONLY TO VEST BUT ALSO TO RETAIN AND USE ANY FOREIGN PROPERTY

A. *The text of the statute and its purposes.*— The text of Section 5 (b) (1) of the Trading With the Enemy Act, as amended by Section 301 of the First War Powers Act, 1941,[5] is explicit and unambiguous. It confers upon the Executive four major groups of powers:

> (a) regulatory powers with respect to foreign exchange, banking transfers, coin, bullion, currency, and securities;
>
> (b) regulatory powers with respect to "any property in which any foreign country or a national thereof has any interest";
>
> (c) the power to vest "any property or interest of any foreign country or national thereof"; and
>
> (d) the powers to hold, use, administer, liquidate, sell, or otherwise deal with "such interest or property" in the interest of and for the benefit of the United States.

[5] Section 5 (b) (1), as thus amended, provides in material part:

"During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

With the exception of the first group of regulatory powers, which is in terms applicable without regard to the nationality of the persons involved, all of the provisions of Section 5 (b) relate to property of any foreign country or national. The second group of regulatory powers and the vesting power are expressly applicable to all foreign property, and it is impossible as a matter of grammar to read the power to hold, use, or otherwise deal with "*such* interest or property," as comprehending any narrower range of property than the vesting power.

"(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *"

In this use, in Section 5 (b), of the phrase "any property or interest of any foreign country or national thereof," there is a significant contrast to the references to "enemy" property in other provisions of the Trading With the Enemy Act. During World War I, seizure of property by the Alien Property Custodian had been governed by Section 7 (c), applicable to property of "enemies" and "allies of enemies," terms which were defined in detail in Section 2 of the Act. See Appendix A, *infra*, pp. 69–70. Hence, when, a few days after our entry into World War II, Congress addressed itself to the problem of authorizing seizure and use of foreign property in the interest of the United States, there was in existence an established statutory vocabulary which would presumably have been used again if Congress had desired to enact powers of like scope for World War II.

The starting point which was adopted for the new legislation, however, was Section 5 (b). That Section, as originally enacted in 1917, conferred regulatory powers over certain transactions "between the United States and *any foreign country, whether enemy, ally of enemy or otherwise*; or between residents of one or more foreign countries." 40 Stat. 415. (Italics supplied.) By the Joint Resolution of May 7, 1940, 54 Stat. 179, it had been amended to confer a broad range of regulatory powers over property "in which

any foreign state[6] *or a national or political subdivision thereof,* as defined by the President, has any interest." (Italics supplied.) As amended, it had become the basis of that extensive system of controls over foreign funds known as the freezing program, which was being actively enforced by the Treasury Department at the time the First War Powers Act was enacted.

Freezing of foreign funds had been instituted under the authority of Executive Order No. 8389 (5 F. R. 1400) issued on April 10, 1940, two days after Germany's invasion of Denmark and Norway. The Order subjected to licensing controls all transactions involving funds in the United States "in which Norway or Denmark or any national thereof has * * * any interest," thereby preventing Germany from forcing the government and inhabitants of the invaded territory to transfer funds in the United States in furtherance of German interests. In brief, freezing did not change the ownership of the funds affected, but merely prohibited any transfer without a license from the Treasury and rendered any unlicensed transfer void. By the Joint Resolution of May 7, 1940, Congress ratified Executive Order No. 8389 and the regulations issued under it, and enlarged the regulatory powers conferred by Section 5 (b). Under this statutory grant, the application of the freezing controls was

[6] That the Resolution used the phrase "foreign state" instead of "foreign country" is plainly of no significance.

successively extended by executive order to the property of additional foreign countries and their nationals. By July 26, 1941, thirty-two foreign countries and their nationals, comprising all of continental Europe as well as China and Japan, and thus including the Axis powers, invaded countries, and neutrals, and in particular Switzerland, were specifically subjected to the freezing controls. Executive Order No. 8785, June 14, 1941, 6 F. R. 2897, as amended by Executive Order No. 8832, July 26, 1941, 6 F. R. 3715.

Hence, in December, 1941, when Congress cast the powers to vest, retain, and use property in the mold of Section 5 (b), it was plainly legislating with respect to all foreign property. The amendments effected by the First War Powers Act, 1941, added to Section 5 (b) of the Trading With the Enemy Act in two major respects. They very substantially enlarged the existing regulatory powers over property of "any foreign country or a national thereof" and, in the same terms, they conferred the powers to vest and retain and use "any property or interest of any foreign country or national thereof." There is plainly no reason to suppose that upon the outbreak of war, Congress determined to limit the applicability of the regulatory powers to a more narrowly defined range of property than that to which they had extended while the United States was at peace. By framing the powers to vest, retain, and use foreign property as additions to

the same sentence in which those regulatory powers were conferred, and by using the identical phrase—"foreign country or national thereof"—to define the extent of their applicability, Congress left no room for doubt that the powers to vest, retain, and use were to be co-extensive with the regulatory powers and were to be available for application as deemed necessary to all foreign property.

This conclusion, compelled by the plain words of Section 5 (b) and confirmed by the prior history of the language used, is fully borne out if the statute is viewed in the light of the needs which called for its enactment. When the First War Powers Act, 1941, was enacted, it had become notorious, in large measure as the result of discoveries made in the course of administering the pre-existing freezing controls, that Germany and the other Axis countries had developed a multitude of techniques for concealing actual ownership or control by enemies of ostensibly neutral property. Real ownership was concealed by the use of nominees and by the erection of complex holding company structures, the stock of such holding companies typically being in the form of bearer shares whose ownership was exceedingly difficult to trace. And control was often divorced from ownership and exercised through options, contractual relationships, possession of vital technical information, and loyalty of key personnel. Where, as was most often the case,

cloaking was effected through neutral countries, the difficulties of detecting the enemy interests were accentuated by laws, of which those of Switzerland are typical, which accord a privileged status to and prohibit the disclosure of certain kinds of banking and commercial information. See United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), 29–31; Hearings before a Subcommittee of the Senate Committee on Military Affairs (Kilgore Committee) 79th Cong., 1st Sess., pursuant to S. Res. 107 and S. Res. 146, June–December, 1945, pp. 49, 52, 68–9, 564–85, 969–77, 1063, 1203–1221; H. Rep. No. 2398, 79th Cong., 2d Sess., p. 3.

During World War I, the right to vest and retain property had depended upon establishment of enemy ownership, and "enemy" was defined in terms of citizenship, residence, and place of incorporation or doing business. Under these definitions, seizure of German-controlled property could have been averted by such simple expedients as, for example, placing ownership of it in a Swiss corporation 100% of the stock of which

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See especially the memorandum from the Legal Division of I. G. Farbenindustrie dated June 8, 1939, entitled "Protection of I. G. Assets Abroad," set out at pp. 573–580, and the further report of I. G. Farbenindustrie to the German Ministry of Economics, dated September 26, 1940, discussing "the success of our camouflage measures in the hitherto enemy countries," set out at pp. 1216–21.

was owned by Germans. In such a case, the property would have been outside the seizure power conferred by Section 7 (c) because owned by a Swiss neutral, for it had been held that the corporate entity could not be disregarded even in cases of 100% stock ownership. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457; see *Hamburg-American Co.* v. *United States*, 277 U. S. 138, 140–41. By extending the vesting power to property "of any foreign country or national thereof" and confirming a concept of nationality determined by substantial ownership and control as well as by location, citizenship, residence, and domicile,[8] Congress made available an instrument

[8] By Executive Order No. 8389, Section 5E, the term "national" was defined as including:

"(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

"(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, * * *."

This definition was incorporated into Section 10 (a) of Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, which

for cutting through any scheme by which the guise of neutrality might be used to hide enemy interests.

Aside from the problem of cloaking, awareness that in a war of world-wide dimensions enemy character could not always be assumed to follow political boundaries was a sufficient reason to free the vesting power from the technical limitations of enemy status embodied in the 1917 Act. Finally, even in the case of property in the United States owned and controlled by an alien of undoubted friendliness toward this country, it was entirely appropriate that Congress, acting in response to the most crucial national needs, should have affirmed the possibility of a vesting to permit the affirmative use of the property by the Government for wartime purposes, protection of any constitutional rights of the friendly alien being assured by the available remedy of suit for just compensation.[9] There was thus every reason why Congress, legislating at the outbreak of a war whose future course was unpredictable, should have deemed it appropriate to confer upon the Executive the widest possible range of powers over all foreign property, and should have chosen, as it did, to extend the powers to vest, retain, and affirmatively use to all property which was then subject to freezing controls or

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delegated powers under Section 5 (b) to the Alien Property Custodian.

[9] See Point III, *infra*.

which might in the future be subjected to those controls.

B. *The legislative history.*—The committee reports and the debates in Congress relating to the First War Powers Act, 1941, make it clear that Section 5 (b) as amended authorizes the vesting and retention of any alien property. The report of the House Committee on the Judiciary stated (H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2–3):

> Title III of the bill deals with the Trading With the Enemy Act, which originally became law on October 6, 1917, during the last war. Some sections of that act are still in effect. Some sections have terminated, and there is doubt as to the effectiveness of other sections.
>
> Title III contains three provisions:
>
> (1) Section 5 (b) of the Trading With the Enemy Act has been continued down to the present time. The existing system of foreign property control (commonly known as freezing control) is based on that subdivision as last amended on May 7, 1940. That subdivision of section 5 as it is now in effect, however, does not give *the broad powers to take, administer, control, use, liquidate, etc., such foreign-owned property* that would be given by section 301 of the bill.
>
> At present the Government exercises supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition

and under license. It is, therefore, a system which can prevent transactions in foreign property prejudicial to the best interests of the United States, but it is *not a system which can affirmatively compel the use and application of foreign property* in those interests.

Section 301 remedies that situation by *adding to the existing freezing control,* in substance, the powers contained in the Trading With the Enemy Act with respect to alien property, extending those powers, and adding a flexibility of control which experience under the original act and the recent experience under freezing control have demonstrated to be advisable. The provisions of section 301 *would permit the establishment of a complete system of alien property treatment.* It vests flexible powers in the President, operating through such agency or agencies as he might choose, to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case. In this respect the bill avoids the rigidity and inflexibility which characterized the alien property custodian law enacted during the last war. The necessity for flexibility in legislation on this subject is accentuated by the vastness of the alien property problem confronting the Government today. At the peak of his activity, the Alien Property Custodian of the last war administered property valued at something over $500,000,000. Today

there is over $7,000,000,000 worth of property already subject to the existing control.

This provision of the bill to a considerable extent follows the pattern of existing law and is *a logical extension of the present foreign property control system,* which has been operating very satisfactorily for almost 2 years. The extension could be put into immediate operation with a minimum amount of trouble or dislocation of legitimate activities. [Italics supplied.]

The House committee report thus shows beyond question that "the broad powers to take, administer, control, use, liquidate, etc.," were to be added "to the existing freezing control" and to extend to all the "foreign-owned property" which was then subject to the freezing control. It points out that the bill was intended to authorize "a complete system of alien property treatment" in which the Executive would have "flexible powers" to use the regulatory powers or the vesting powers or both "in the manner deemed most effective in each particular case"—a clear indication that the two sets of powers were to be available co-extensively. That the committee fully recognized the magnitude of the property thus subjected to the powers to vest, retain, and use is shown by its comparison of the

"$7,000,000,000 worth of property" then frozen[10] to which the new powers conferred by Section 5 (b) were to apply, with the approximately $500,000,000 worth of property vested by the Alien Property Custodian in World War I.

The report of the Senate Committee on the Judiciary, S. Rep. No. 911, 77th Cong., 1st Sess., p. 2, although somewhat briefer, is essentially similar.

The debates in Congress on the bill which became the First War Powers Act confirm the conclusion that the powers to vest, retain, and use property, conferred by Section 5 (b), were regarded as additions to the existing freezing powers and as having an application co-extensive with them. Thus, in response to a question whether the bill "in any respect goes beyond the war powers yielded to President Wilson," Senator Van Nuys, Chairman of the Senate Judiciary Committee, stated (87 Cong. Rec. 9838):

> It does so not in reference to the Overman Act, under title I; but when it comes to the Trading With the Enemy Act, in the provisions for seizure and freezing of alien property, it goes further, and *not only*

[10] The ownership of this $7,000,000,000 of frozen property was as follows (all figures approximate):

Nationals of enemy countries	$465,000,000
Nationals of enemy-occupied countries	4,000,000,000
Nationals of other blocked countries	2,700,000,000

Annual Report, Office of Alien Property Custodian, March 11, 1942, to June 30, 1943, pp. 93–5.

freezes it, but seizes the property; possession of it vests in the United States, and the property is to be liquidated and disposed of under the rules and regulations of the Department. To that extent it exceeds the powers granted President Wilson." [Italics supplied.]

In the House, Representatives Gwynne, Kefauver, and Robsion, all members of the Judiciary Committee which reported the bill, similarly spoke of the amendments as conferring the power to vest and use the same property that was already subject to the freezing controls. See 87 Cong. Rec. 9862, 9865, 9866.[12] Mr. Hancock, also

[11] See also the remarks of Senator Van Nuys at 87 Cong. Rec. 9845:

"* * * the Attorney General informed us that there are at least $7,000,000,000 of funds that have to be seized or frozen under present conditions. This measure gives authority to that agency, whether it be the Alien Property Custodian or otherwise, not only to freeze these assets, but to seize them and dispose of them and liquidate them * * *." The $7,000,000,000 referred to was the total amount of property then subject to freezing. See note 10, *supra*.

[12] Summarizing Title III of the First War Powers Act, Mr. Gwynne said (87 Cong. Rec. 9862):

"The second authority is this: To regulate and prohibit the transfer or use of property of any foreign nation or of any foreign national in the United States.

"Third, the President is given authority to vest the ownership of *such property* in any person designated by the President. For example, I presume later on we will carry out the purposes of this statute by creating an Alien Property Custodian.

"Fourth—and this is the principal difference between this law and the one we had during the last war—the *President may hold and use*—that is the new part—*or sell such prop-*

a member of the committee, who was described as having given "special attention to this measure" (87 Cong. Rec. 9856), was even more explicit (87 Cong. Rec. 9861).

> There is another very important change in section 301 from the present Trading With the Enemy Act. Under our former law I think we still have power to seize enemy alien property and under our present law of export control we have considerable

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erty for the benefit of the United States." [Italics supplied.]

Mr. Kefauver said (87 Cong. Rec. 9865):

"It was explained to us by representatives of the Treasury that it was absolutely necessary for the present act—5 (b)—to be reenacted in order to enable the Treasury to carry out its policy of freezing certain credits and of handling certain financial interests during the war. The explanation made to us, and I think it is carried out in this bill, is that the only change the Treasury wanted in 5 (b) of the Trading With the Enemy Act was to give the executive department power not only to passively freeze credits and to negatively handle the operation of some manufacturing plants by a system of licenses or controls that they have to work under at the present time, but also to give the President the power to actively put into operation those interests or those securities or plants that might be taken . . . and be seized under authority of 5 (b) of the present act."

Mr. Robsion said (87 Cong. Rec. 9866):

"Up to this time our Government has already taken over $7,000,000,000 worth of money, credits, and other property. There is no sense in this Government holding this $7,000,000,000 worth of property inactive, allowing it to rust, plants to remain idle, and bear the expense of its maintenance. This bill gives the Government the right, not only to take it over, but to convert it, to sell it, or to use it, and that is one important amendment to the Trading With the Enemy Act, and it ought to be adopted."

> additional power over alien property, but this goes much further and *gives the agents appointed by the Government the power to seize any property, any and all alien property, whether belonging to friend or enemy, and to put it into use.* This is a power that has never been enjoyed before by any specific provision and it is important. It gives us the right to utilize the property we take over. The bill covers considerably more ground in this respect than the old act. [Italics supplied.]

In contrast to this very explicit and considered statement of Mr. Hancock, the debates in the House include two remarks which, if read out of context, might be thought to support the view that only the vesting of enemy property was contemplated. Thus, Mr. Sumners, the Chairman of the House Judiciary Committee, at one point stated that "this is simply a section dealing with alien enemies" (87 Cong. Rec. 9859). The statement was made, however, in response to a question whether the regulatory provisions of subparagraph (A) of Section 5 (b), which were in terms applicable to transactions in coin, bullion, currency, or securities without regard to the nationality of the owner, extended to "securities held by anybody in the United States." The statement was thus addressed to the question whether those provisions applied to domestic transactions in which no foreign national parti-

cipated; no issue had been raised as to the distinction between aliens and alien enemies. Subsequently, Mr. Sumners agreed "absolutely" to the statement that these regulatory provisions applied to "transactions involving property in which any foreign country or a national thereof has an interest" (87 Cong. Rec. 9862). And on the following day he further qualified his remarks on this point by stating that "there was no intention on my part * * * to propose or support any legislation reducing the powers of the President under existing law, nor to reduce in any degree existing law relative to domestic transactions" (87 Cong. Rec. 9946). Since it was plain under existing law that the provisions of subparagraph (A) to which Mr. Sumners referred were applicable without regard to the nationality of the persons involved,[13] this qualification destroyed the entire force of his previous statements with respect to subparagraph (A). In any event, Mr. Summers' extemporaneous statement, addressed to the extent of the regulatory

[13] See *supra*, p. 10. Those provisions were an expansion of the provisions added to Section 5 (b) by the Emergency Banking Act of March 9, 1933, 48 Stat. 1, which had been repeatedly held applicable without regard to the nationality of the persons involved. *British-American Tobacco Co.* v. *Federal Reserve Bank*, 104 F. 2d 652, 105 F. 2d 935 (C. C. A. 2); *Uebersee Finanz-Korporation, Etc.* v. *Rosen*, 83 F. 2d 225 (C. C. A. 2); *Campbell* v. *Chase Nat. Bank*, 71 F. 2d 669 (C. C. A. 2), appeal dismissed, 291 U. S. 686, certiorari denied, 293 U. S. 592; see *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 295–6.

provisions of subparagraph (A), cannot be read as a statement that the powers to vest and retain and use extended any less broadly than did the existing freezing controls.

The only other reference to "enemies" in the debates was made by Representative Fish who, in a three-sentence summary of Title III of the First War Powers Act, spoke of that title as giving "the power to use property of the enemy that we may confiscate" (87 Cong. Rec. 9856). Plainly the reference to enemy property was no more than illustrative and cannot be read as an assertion, contrary to the explicit language of the statute, that the bill did not apply to all foreign property, or that the powers to vest and to use were less extensive than the regulatory powers.[14]

[14] Mention should perhaps also be made of the statement of Mr. Sumners that "there is no substantial difference between the provisions of this bill and the similar grants of power in the Overman Act and the Trading With the Enemy Act" (87 Cong. Rec. 9859; see also remarks of Mr. Fish, 87 Cong. Rec. 9856, and Mr. Springer, 87 Cong. Rec. 9865). The context does not indicate whether Mr. Sumners was addressing himself merely to the character of the powers granted, or also to the range of property to which they would apply; nor does it indicate what he then conceived to have been the powers available to President Wilson. Such a general characterization of the bill as a whole is thus of little force in construing the scope of the vesting power which it conferred. In this connection, it should be noted that Senator Van Nuys also initially characterized the bill "in a nutshell" as granting "the same war powers that were exercised by President Wilson," but later explicitly stated that the bill "not only freezes * * * but seizes the prop-

Such incidental statements on the floor of Congress, none of which were specifically addressed to the question of the scope of the powers to vest, retain, and use conferred by the bill, cannot prevail against the explicit statement of Mr. Hancock that the bill gave the power "to seize any property, any and all alien property, whether belonging to friend or enemy, and to put it into use"—a statement with which neither Mr. Sumners nor any other member of the House took issue—or against the numerous references in the debates and the committee reports to the powers to vest and retain and use property as additions to and co-extensive with the existing freezing controls, applicable to all foreign property. At no time in the course of the debates was there any suggestion that the powers to vest, retain, and use were to apply to any less extensive range of property than was then subject to the freezing powers to which they were added. We submit that from the legislative materials no other conclusion is possible than that Congress understood the Act as achieving the result which its text compels and which the committee reports unambiguously declared. Section 5 (b) must be accepted as conferring the powers to vest and to put to affirmative use in the interest of the

erty * * *. To that extent it exceeds the powers granted President Wilson" (87 Cong. Rec. 9838)—a clear statement that the vesting power was to be co-extensive with the existing freezing power.

United States all of the property which was then subject to the freezing powers, *i. e.*, all property of any foreign country or national.

C. *Misconceptions underlying the denial of this construction by the court below.*—The court below thought that this result nevertheless could not have been intended. It said that it found no reason to believe (R. 9–10)

> * * * that the calamity of war was to be used to eliminate and destroy all alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of § 5 (b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest.

We respectfully suggest that there is no basis for such a picture of wanton destruction of the interests of alien friends in the United States. In the first place, Congress did not make the exercise of the vesting power mandatory, but rather contemplated a "flexible program" in which the Executive could choose from among a wide variety of powers those most appropriate to the needs of each particular case. At the time of passage of the First War Powers Act, although the statutory powers were available for extending

freezing controls to all foreign property in the United States, by no means all such property had in fact been subjected to freezing. There was no reason to suppose that the more drastic measure of vesting would be taken in respect of all foreign property, or even of all foreign property then frozen. In practice, the Custodian has in general exercised the vesting power only where, as in this case,[15] he had grounds for believing that the property was enemy owned or controlled, or where the vesting was deemed advisable to conserve the property of a resident of enemy-occupied territory. See H. Rep. No. 2398, 79th Cong., 2d Sess., p. 4.[16]

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[15] In Amendatory and Supplemental Order No. 1 to Vesting Order No. 14 (see *infra*, pp. 96–101) the Custodian found that the respondent was acting for or on behalf of and was controlled by Wilhelm and Marta von Opel, both nationals of Germany, and that all of its capital stock was beneficially owned by Wilhelm and Marta von Opel with contingent interests in other members of the von Opel family.

[16] The following figures, taken from the Annual Report, Office of Alien Property Custodian, Fiscal Year Ending June 30, 1944, p. 14, indicate the relatively small proportion of all foreign property which has in fact been vested:

Total foreign property (allied, neutral, enemy-occupied and enemy countries)	$15,556,000,000
Foreign property under some measure of control by the U. S. Government	7,965,000,000
Total enemy property	567,000,000
Property vested in Alien Property Custodian	197,000,000

As a result of subsequent expansion of the vesting program, it has been estimated that as much as $250,000,000

Moreover, Congress did not "reach with confiscation" even the limited amount of foreign property not owned by enemies which may have been vested during this war, nor are foreign owners of vested property left "without adequate remedy." The ultimate disposition of the vested property has not yet been determined by the Congress. (*Cf.* Trading With the Enemy Act, Section 12, last paragraph; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 120–121.) Congress has, however, by the addition of Section 32 to the Act, empowered the Executive to return vested property to many foreign nationals and some enemies within the World War I definitions upon a finding that return is in the interest of the United States. (Pub. L. No. 322, 79th Cong., 2d Sess., March 8, 1946.)[17] Where return is not made under these provisions, the foreign national claimant may secure full protection of any and all constitutional rights through the traditional remedy of a suit against the United States for just compensation. See Point III, *infra,* pp. 54–63. But to compel return if the property is not found to be enemy property within the definitions of the 1917 Act, even though return is determined

additional property might be vested. Annual Report, Office of Alien Property Custodian, Fiscal Year Ending June, 1945, p. 9.

[17] By Executive Order No. 9725, May 16, 1946, 11 F. R. 5381, the Alien Property Custodian was designated as the officer to administer the powers and authority conferred by this Section.

by the Executive not to be in the public interest, would destroy the authority to make affirmative use of all foreign property in the national interest which Congress conferred by the enactment of the First War Powers Act.

D. *Administrative construction of the powers conferred by Section 5 (b).*—The contention was made on behalf of the respondent in both courts below that the Custodian's "actual practice and philosophy" (Brief for Appellant in the Court of Appeals for the District of Columbia, 19) support a different interpretation of the power to vest and retain granted by Section 5 (b) from that advanced here. That the Custodian has in general refrained from vesting property not believed to have a substantial enemy taint (see p. 29, *supra*) merely reflects an election to exercise less than his full authority, and cannot affect the availability of that authority whenever circumstances deemed appropriate for exercising it might arise. *Cf. United States* v. *Lowden,* 308 U. S. 225, 239; *Neuberger* v. *Commissioner,* 311 U. S. 83, 89; *Peoples Natural Gas Co.* v. *Federal Power Commission,* 127 F. 2d 153, 155 (App. D. C.) certiorari denied, 316 U. S. 700. In any event, the Custodian has indicated his understanding that the vesting power extends to non-enemy property by issuing many vesting orders upon a finding solely that the owner was a "foreign national," without making reference in the orders themselves to the

cloaking or other hostile action which may have prompted his decision. See, *e. g.*, Vesting Orders No. 1052, 8 F. R. 4214; No. 1250, 8 F. R. 7044; No. 1409, 8 F. R. 7049; No. 1587, 8 F. R. 10582; No. 1636, 8 F. R. 10584, 9 F. R. 359; No. 2097, 8 F. R. 16463; No. 2350, 8 F. R. 14634; No. 2643, 9 F. R. 351; No. 2692, 9 F. R. 463; No. 3056, 9 F. R. 2703; No. 3266, 9 F. R. 3664, 9 F. R. 8270; No. 3695, 9 F. R. 7217. And many of the vesting orders addressed to property of "nationals of a designated enemy country" reveal on their face that they are founded upon a concept of nationality based upon control by, or action on behalf of, persons hostile to the United States which goes beyond the definition of "enemy" embodied in Section 2 of the Act, thus confirming the Custodian's understanding that Section 5 (b) had enlarged the vesting power. See, *e. g.*, Vesting Orders No. 1036, 8 F. R. 6187; No. 1040, 8 F. R. 3644; No. 1218, 8 F. R. 7037; No. 2263, 8 F. R. 13989; No. 2694, 9 F. R. 464; No. 2883, 9 F. R. 1625; No. 3266, 9 F. R. 3664, 9 F. R. 8270; No. 3267, 9 F. R. 3665; No. 3684, 9 F. R. 7213.

The opinion of the Vested Property Claims Committee of the Office of Alien Property Custodian in *Matter of Leopold H. P. Klotz*, May 2, 1944, Office of the Alien Property Custodian, Final Determinations of the Vested Property Claims Committee, December, 1943, to March, 1946, p. 108, to which the respondent made refer-

ence below, falls far short of establishing the contrary. It merely asserts the Custodian's power to divest where vesting had been based upon a mistaken belief that the claimant was a "cloak." It should be noted that a return was in fact made in this case only upon the Custodian's finding that it would be "in the interest of and for the benefit of the United States" (Divesting Order No. 93, June 6, 1944, 9 F. R. 6471), a standard subsequently embodied in Section 32. The Custodian's recognition, after the *Klotz* decision and prior to the enactment of Section 32, that his authority to make returns to foreign nationals by administrative decision in the absence of legislation was doubtful (see Annual Report, Office of Alien Property Custodian, Fiscal Year Ending June, 1945, p. 162) is wholly inconsistent with an understanding by the Custodian that his authority to retain vested property extended only to property of enemies or allies of enemies.

II

SECTION 9 (a) OF THE ACT DOES NOT AUTHORIZE THE RECOVERY OF PROPERTY OF A FOREIGN NATIONAL WHICH THE CUSTODIAN WAS EMPOWERED TO VEST, RETAIN, AND USE

In *Markham* v. *Cabell*, 326 U. S. 404, this Court enunciated the principles which we think must govern the applicability of the remedies of Section 9 (a) to property vested pursuant to Section 5 (b). Declaring that Section 9 (a)

came into force on the outbreak of this war "unless repealed or superseded" (326 U. S. at 409), this Court held that the right of one who was not a foreign national to sue on a debt under Section 9 (a) "has not been wholly withdrawn" (326 U. S. at 412). In authorizing suit on such a debt by one who was not a foreign national, the Court was careful to point out that such an action was not "inconsistent with the new power granted the Executive by § 5 (b) to make any affirmative use of the property that the national interest in time of war might require" (326 U. S. at 412), and did not "collide * * * with the policy of § 5 (b)" or "cause interference with the administration of the vested property pursuant to § 5 (b)" (326 U. S. at 413). Judgment was expressly reserved on the question whether the provisions of Section 9 (a) prescribing the method of satisfaction of judgments rendered pursuant to that Section and allowing suits to reclaim property "have been superseded by § 5 (b)" (326 U. S. at 412, 413).

That the remedies of Section 9 (a) remain available, as this Court has indicated, only to the extent that they are not inconsistent with the exercise of the new powers conferred by Section 5 (b) and do not collide with the policy of that Section is a result which, we submit, follows from the fact alone that Section 5 (b) is the more recent enactment of Congress. Unambiguously extending the power to vest and retain to prop-

erty of any "foreign country or national thereof," it cannot be reduced to narrower dimensions without doing violence to a plainly stated Congressional purpose. The ordinary presumption against repeals by implication, which favors a construction of an amendment consistent with the preexisting statute if the amendment, fairly read, will bear such a construction, can have no application here. (Cf. *United States* v. *Jackson*, 302 U. S. 628, 631–2). If Section 9 (a) is to be read as inconsistent with the retention of property of foreign nationals, there is no process of construction by which the terms of Section 5 (b) can be reconciled with it, and the earlier Section must give way. *United States* v. *Tynen*, 11 Wall. 88, 92–3; *United States* v. *Fisher*, 109 U. S. 143, 145; *United States* v. *Yuginovich*, 256 U. S. 450, 463–4.

Confirmation of this conclusion is to be found in the circumstances in which Section 5 (b) was amended. Congress has made it clear that it had no desire to make consistency with the preexisting Trading With the Enemy Act a measure of the powers embodied in Title III of the First War Powers Act, 1941. On the contrary, acting in great haste within a week after our declaration of war upon Germany and Japan,[18] Congress

[18] The original bills, H. R. 6206 and S. 2118, were introduced in the House on December 11, 1941 (87 Cong. Rec. 9704) and in the Senate on December 12 (87 Cong. Rec. 9706). Title III of those bills was wholly different from Title III as enacted. On December 15, 1941, new bills, H. R.

concerned itself solely with assuring the immediate availability of powers deemed necessary in the prosecution of the war, and its starting point was the necessities of this war as understood from contemporaneous experience with freezing controls rather than the powers granted during World War I. Indeed, so indifferent was Congress to the possibility of inconsistencies between Section 5 (b) and provisions enacted during World War I, that it did not seek to determine which sections of the Trading with the Enemy Act were still in force. The report of the House Committee is prefaced by the statement that "Title III of the bill deals with the Trading With the Enemy Act, which originally became law on October 6, 1917, during the last war. Some sections of that Act are still in effect. Some sections have terminated, and there is doubt of the effectiveness of other sections." (H. Rep. 1507, 77th Cong., 1st Sess., p. 2.) Without further discussion of provisions of the Act other than Section 5 (b), the report goes on to discuss the proposed amendments to Sec-

6233 and S. 2129 were introduced in substantially the form in which the Act was passed (87 Cong. Rec. 9828, 9753), and the bills were reported back favorably to both Houses on the same day (87 Cong. Rec. 9801, 9789). The bills were debated and passed both Houses on December 16 (87 Cong. Rec. 9837–46, 9855–68). On December 17, the Senate withdrew its bill and passed the House bill with amendments (87 Cong. 9893–5), and the House agreed to the Senate amendments (87 Cong. Rec. 9946–7). On December 18 the Act was signed by the President (55 Stat. 841).

tion 5 (b) and to contrast the new powers to be conferred by the amendments with the powers already available under that Section. In the House Mr. Kefauver similarly stated (87 Cong. Rec. 9865):

> * * * Of course, this bill does not cover everything that will have to be done. There are some parts of the Trading With the Enemy Act that are still in force, and there are some parts of it that are not in force. I think it is going to take a very careful examination of all these laws to see what other parts it may be necessary again to make vital during the continuation of the war, * * *.

These disclosures that Congress had neither reviewed the provisions of the Trading With the Enemy Act nor made any assumption as to how much of it remained in force emphasize the artificiality of applying here any presumption that Congress sought to avoid inconsistency with the World War I legislation. *Cf. United States* v. *Claflin*, 97 U. S. 546, 551. But, in any event, in view of the terms used in Section 5 (b) and their history, there is no process by which the power to vest and retain may fairly be construed as comprehending anything less than all property of foreign countries and their nationals. If Section 9 (a) or any other section of the Act surviving from World War I is inconsistent in this respect, the earlier sections, rather than an unambiguous later amendment,

must make whatever accommodations are needed to permit the Act to operate as "an integrated whole," *Markham* v. *Cabell, supra,* 411.

We think it clear, therefore, that if there is any inconsistency between the provisions of Section 9 (a) and those of Section 5 (b) so construed, the latter enactment of Congress must control and Section 9 (a) be deemed *pro tanto* repealed or superseded. Plainly, if Section 9 (a) is to be construed as the court below has construed it there is such a conflict. To compel the return of property of a national of a foreign country designated by the Executive, which has been vested upon a determination that such vesting is "in the public interest,"[19] would nullify the explicit legislative grant of power to vest, retain and use the property of all foreign nationals, and would defeat the declared Congressional purpose to permit the affirmative use of foreign property in the interests of the United States. But we think there is no such conflict between the two Sections, and that if Section 9 (a) is read according to its terms and with due regard for its historic function in the scheme of the Act, the remedies of that Section can be fully integrated with the new powers conferred by Section 5 (b) without interfering with the exercise of those powers.

Although Section 9 (a) authorizes "any person not an enemy or ally of enemy" to bring suit for

[19] See Vesting Orders set out in Appendix C, *infra*, pp. 95–111.

the return of vested property, it requires, as the condition of any recovery, that the claimant "establish" an "interest, right, [or] title" in the property sued for, and it empowers the court, sitting "in equity," to direct the return of the "money or other property * * * or the interest therein to which the court shall determine said claimant is entitled." Appendix A, *infra*, pp. 73–74. If the vested property was the property of a foreign country or national, which the Custodian was authorized to vest and retain, the claimant cannot be held "entitled" to its return, for the property is held by the Custodian pursuant to an act of Congress which expressly authorizes him to retain it.

Thus construed, Section 9 (a) continues to have the function it had in World War I. As originally enacted, it was the complement of the seizure power conferred by Section 7 (c). Section 7 (c) empowered the Custodian to seize any property upon his *ex parte* determination that it was enemy owned. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. Since such an *ex parte* determination could not stand as a final adjudication of property rights, a judicial determination of the question of enemy ownership—then the statutory criterion of the right to seize and retain—was afforded by suit under Section 9 (a). If the property was determined not to be enemy owned, it was to be

returned to the former owner; if it was determined to be enemy owned, it was retained by the Custodian. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457; *Stoehr* v. *Wallace, supra.* As stated by Mr. Justice Holmes in *Central Union Trust Co. v. Garvan, supra,* "the subject of the section [Section 7 (c)] is enemy property only" (p. 567), but "for the purposes of immediate possession the determination of the Enemy Property Custodian [that property belongs to an enemy] is conclusive, whether right or wrong" (p. 566), Section 9 (a) "saving the ultimate rights of the claimant" (p. 568). The purpose of Section 9 (a) was thus to afford an ultimate judicial determination of the question whether the property seized was within the specifically stated seizure power, and to remedy by return those seizures in which the Custodian's *ex parte* determination was judicially found to be incorrect. In short, Section 9 (a) was never intended to establish a substantive definition of the range of property whose seizure and retention was authorized; it served merely the procedural function of providing an opportunity for a full judicial determination which would replace the Custodian's initial *ex parte* administrative determination.

With the enlargement of the vesting power to comprehend not merely enemy property but all foreign property, the range of property which

may be returned by suit under Section 9 (a) must be deemed to have been correspondingly narrowed. As before, the Custodian may initially establish dominion over property on his own determination that the property is within the range of vestible property specified by the Act. *United States* v. *The Antoinetta,* 153 F. 2d 138, 143 (C. C. A. 3), certiorari denied, 328 U. S. 863, 864; *Application of Alien Property Custodian of U. S.,* 60 N. Y. S. (2d) 897, 901–2 (App. Div. 4th Dept.); *Stern* v. *Newton,* 180 Misc. 241, 244–5, 39 N. Y. S. 2d 593, 596–8 (Sup. Ct.). Moreover, suit for return under Section 9 (a) continues to be available as the only statutory means for a subsequent judicial determination, which will replace the Custodian's initial *ex parte* determination and thus satisfy the requirements of procedural due process. But in either case the question to be determined is whether the property was within the vesting power specifically conferred. If the property was not within that power, *i.e.,* if the claimant is, in the words of Section 9 (a), "entitled" to the property, the court is authorized, as it has been since the Section was originally enacted, to order return. But where the court finds that the property was within the specified range of Section 5 (b), *i.e.,* that it was property of a "foreign country or national thereof," the court cannot order return without disregarding the major substantive change which the First War Powers Act,

1941, effected in the Trading With the Enemy Act.

That the court below did disregard this major substantive change is dramatically illustrated by one especially grave consequence of its decision. The holding that any one not an "enemy or ally of enemy" can compel return by suit under Section 9 (a) would make it possible for unquestioned enemies to immunize themselves from the consequences of the Trading with the Enemy Act. Despite enemy ownership and control, a neutral corporation can readily escape the statutory definition of "enemy or ally of enemy." See pp. 15–17, *supra*. Such a corporation, being a person other than an "enemy or ally of enemy", would, in the view of the court below, prevail in a suit under Section 9 (a). Thus, one of the plain advantages envisaged by the extension of the powers to vest and retain to any property of foreign nationals would not be realized.

Until the decision of the court below, the few courts in which the problem has been raised had decided in accordance with the position outlined. Two district courts in addition to the District Court for the District of Columbia in this case have held that in view of the enlargement of the power to vest and retain made by Congress in the First War Powers Act, 1941, a foreign national could not recover vested property by suit under Section 9 (a). *Iki* v. *Crowley*, W. D.

Wash., May 10, 1944, and on rehearing, July 10, 1944;[20] *Hayden* v. *Crowley*, W. D., Wash., May 10, 1944, and on rehearing, July 10, 1944;[20] *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215, 219, 55 F. Supp. 906, 912–14, 914 (S. D. N. Y.). See also *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 797 (C. C. A. 2), certiorari granted, February 17, 1947, No. 346.[21]

[20] These cases were decided by Judge Black in identical unreported opinions. The opinion of Judge Black follows in full:

"After consideration of the very comprehensive briefs in behalf of each party which supplement the oral arguments which were submitted, and regardless of whether or not the complaint is or is not otherwise sufficient I am satisfied that it is essential that the plaintiff affirmatively allege that he is not a national of a foreign or enemy country. Such allegation is not now present.

"For such reason in any event the defendants' motion to dismiss should be granted.

"Order in harmony herewith may be presented, after notice.

"DATED May 10th, 1944."

[21] In *Duisberg* v. *Crowley*, 54 F. Supp. 365 (D. N. J.), a motion to dismiss similar to that made in this case was denied on the sole ground that the allegations of the complaint amounted to a denial that the plaintiff was a foreign national. The case was later dismissed for failure of prosecution, *Duisberg* v. *Markham*, 149 F. 2d 812 (C. C. A. 3), certiorari denied, 326 U. S. 759.

Several cases have allowed recovery in suits under Section 9 (a) upon findings that the claimant was not a national of a foreign country. *Josephberg* v. *Markham*, 152 F. 2d 644, 649 (C. C. A. 2); *Standard Oil Co. (N. J.)* v. *Markham*, 64 F. Supp. 656 (S. D. N. Y.); *Brassert* v. *Markham*, D. Conn., November 21, 1946. See also *Kind* v. *Clark*, C. C. A. 2d, April 9, 1947.

The court below sought to read the two provisions together in a different manner. Taking as its point of departure the provisions of Section 9 (a) and erecting those provisions into a controlling definition of the range of property which the Custodian was authorized to retain, it has assumed that that definition survived the 1941 amendments and has sought to impose upon Section 5 (b) a construction which would render it consistent with that definition. Feeling itself compelled to recognize that Section 5 (b) confers the power to vest property of all foreign nationals, the court has drawn a distinction between the power to vest and the power to retain which we think neither the text nor the legislative history of the First War Powers Act permits (see *supra*, pp. 9-28), and has imputed to the vesting power a narrow procedural function which was never suggested by Congress and for which there was no conceivable necessity. It stated its construction thus (R. 9):

> Under the Act as it was in World War I, the seizure of alien property was limited to that of enemies, and the seizure was "after investigation." Thus, a determination of enemy ownership was a prerequisite to seizure. A more expeditious procedure to assure quick protection of our economy against enemy influence was to seize initially all alien property, and then upon investigation and with the burden of pro-

ducing the facts placed upon the claimant rather than upon the Custodian, to return the property of aliens not enemies. Amended § 5 (b) and § 9 (a) when read together, prescribe exactly that procedure.

There is no warrant for such a distinction between the power to vest and the power to retain and use. As we have seen, the text of Section 5 (b), as amended, provides that "any property or interest of any foreign country or national thereof shall vest" as determined by the President, and that "such property" shall be held and used, etc., in the interest and for the benefit of the United States. The phrase "such property" can refer only to property of a foreign country or national thereof which has been vested. While the power of the Executive to hold and use vested property for the benefit of the United States may be terminated upon a judicial determination that the property is not the property of a foreign country or national thereof (see *supra*, p. 41), the Section cannot be read otherwise, we submit, than as a direction that vested property which is the property of a foreign country or national may be retained and used by the Executive in the interest and for the benefit of the United States. And the committee reports and debates clearly disclose that the major substantive change which Congress sought to enact was the grant of authority not merely to vest, but to "affirmatively compel the use and application" in the interest

of the United States of the foreign property which was then subject to freezing controls. H. Rep. No. 1507, 77th Cong., 1st Sess., p. 3. Obviously, this purpose would be defeated if the Government could be required to surrender all vested foreign property which was not enemy property.

Moreover, there was no reason for Congress to confer a vesting power of the narrowly limited character attributed to it by the court. Nothing in the history and administration of the Trading With the Enemy Act suggests that the procedural requirements of investigation and determination of enemy character, to which the court conceived the 1941 amendments were addressed, were regarded as imposing a serious administrative burden calling for Congressional alleviation. This Court has emphasized the summary and *ex parte* nature of the Custodian's determination of enemy character under Section 7 (*c*), and has referred to his power as the power to seize property which was merely "supposed" or "believed" to be enemy owned. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *Yakus* v. *United States*, 321 U. S. 414, 443. Thus in proceedings to enforce the Custodian's demand that property be transferred to him, it has been held that his recital that an investigation had been made was conclusive and his findings were unreviewable. *Garvan* v. *Com-*

mercial Trust Co., 275 Fed. 841, 844 (D. N. J.), affirmed *sub nom. Commercial Trust Co.* v. *Miller*, 281 Fed. 804 (C. C. A. 3), affirmed, 262 U. S. 51. *Cf.* 262 U. S. at 55. Nor did the character of his investigation and the evidentiary support for his findings assume any significance in a suit under Section 9 (a), for this Court has indicated that in such a suit there was a trial *de novo*, "unembarrassed by the precedent executive determination." *Stoehr* v. *Wallace*, *supra*, 246; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 53.. Thus, under the provisions of the Act as it then stood, the Custodian could proceed with all the expedition necessary.[22] And, if the Congressional purpose had been merely to ensure the prompt immobilization of all foreign property pending judicial determination of non-enemy ownership, the vesting

[22] In fact the Custodian has not attempted to "seize initially all alien property," as the court suggested, but has vested only property which he believed was enemy-owned or controlled, or should be vested for conservatory reasons. See p. 29, *supra*. As a guide to his discretion in exercising this power, he has regarded the task of investigation and determination both of the ownership of property and the type of action which is necessary in the national interest in respect of it as a task of major importance. See Annual Report, Office of Alien Property Custodian, March 11, 1942, to June 30, 1943, p. 22. And his vesting orders typically recite the fact of an investigation and contain findings of the ownership of the property by a national of either a foreign country or a designated enemy country, as well as of the necessity for vesting the property in the national interest. See, *e. g.*, the vesting orders involved in this suit, set out in Appendix C, *infra*, pp. 95–111.

provision of Section 5 (b) would have been superfluous, for such immobilization of foreign property could have been fully accomplished through exercise of the freezing controls conferred by subsection (B) of Section 5 (b). Appendix A, *infra*, pp. 70–72.

The court below also found support for its conclusion in the failure of Congress, subsequent to the passage of the First War Powers Act, 1941, to enact amendments which would have confirmed the construction of the Trading With the Enemy Act we advance here. As introduced, the bill [23] which became Public Law No. 671, 79th Cong., 2d Sess., August 8, 1946, included a proposed Section 33 which would have expressly declared that a foreign national might not institute suit under Section 9 (a) for the return of vested property, and provided an explicit remedy by way of suit for just compensation in the Court of Claims. The proposed Section 33 was reported out favorably by the House Committee on the Judiciary (H. Rep. No. 2398, 79th Cong., 2d Sess., pp. 2–9), but it was deleted by the

[23] H. R. 5089, 79th Cong., 1st Sess., reintroduced as H. R. 6890, 79th Cong., 2d Sess., and designated S. 2378 in the Senate.

H. R. 4840, reintroduced as H. R. 5031, 78th Cong., 2d Sess., also referred to by the court, was a predecessor to the foregoing bills. Expiration of the session before this bill could be reported out of Committee foreclosed any action on it. There is therefore no indication of affirmative objection to it, as the opinion below appears to suggest.

Senate Committee (S. Rep. No. 1839, 79th Cong., 2d Sess., p. 2) and the House acquiesced in the deletion. 92 Cong. Rec. 10217–18.

The report of the Senate committee stated that its deletion of Section 33 would "eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain the return of his property under section 9 (a)" (S. Rep. No. 1839, 79th Cong., 2d Sess., p. 2). But the House committee expressed a diametrically opposite view of the existing state of the law. Its committee report had pointed out that "the courts have thus far sustained the * * * position" that a foreign national may not "secure the return of property by a suit under section 9 (a)," [24] and had stated that by expressly declaring that a foreign national might not institute suit under Section 9 (a), the bill "reaffirms and gives effect to the policy adopted by the Congress in title III of the First War Powers Act, 1941, of authorizing the Government during this war to take over foreign property and to use it in the interest of the United States." (H. Rep. No. 2398, 79th Cong., 2d Sess., p. 3.) In acquiescing in the Senate's deletion of Section 33, both majority and minority members of the House committee indicated that they did so only because the session of Congress was nearing its

[24] The report was written before the decision of the Court of Appeals in this case.

close and insistence on the provision might jeopardize the entire bill. See remarks of Mr. Celler and Mr. Michener, 92 Cong. Rec. 10218. And Mr. Celler, the Chairman of the subcommittee in charge of the bill, clearly indicated that his acquiescence in the Senate's deletion of these provisions was based upon the understanding of the existing state of the law expressed in the report of the House committee. While he apparently thought that the deletion of Section 33 would leave unimpaired a foreign national's procedural right to institute suit under Section 9 (a), he stated that "the court has held that the suit cannot result in a judgment against the United States" (92 Cong. Rec. 10218).

This Court has often cautioned against speculation as to the reasons for Congressional failure to enact legislative proposals (*e.g., Helvering* v. *Hallock*, 309 U. S. 106, 119–21) and has pointed out that the failure to enact a proposed amendment "cannot operate retroactively * * * to give the statute * * * a different meaning from" that which it had when enacted. *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 265; *cf. United States* v. *Lowden*, 308 U. S. 225, 239; *Higgins* v. *Smith*, 308 U. S. 473, 479–80. Particularly in view of the difference in the views expressed by the House and Senate committees as to the effect of the deletion, it is submitted that the action of Congress in 1946, in deleting the proposed Section

33, cannot control the construction of the First War Powers Act, 1941. If weight is to be attributed to the views expressed, however, we suggest that in these circumstances the views of the House committee should prevail. Not only did Public Law No. 671 originate in the House, but it was considered far more extensively and reported upon more fully by the House committee.[23]

On the other hand, in contrast to the inconclusive inferences from the non-action of Congress, such affirmative action as Congress has

[23] The House committee had the bill under consideration for six months; it held public hearings on it on four different days in February and May, 1946. Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 79th Cong., 2d Sess., on H. R. 5089. As Mr. Michener stated, "Extensive, and I mean extensive, hearings have been held." 92 Cong. Rec. 10217. Section 33 was widely discussed at those hearings and the principal amendments made to the bill during the course of the hearings were to the provisions of that Section. See the successive texts of the bill set out at House Hearings, pp. 1–5, 43–49, with which compare the similar provisions of H. R. 6890. The colloquies on the floor of the House were joined in by a number of Representatives who had participated in the debates on the First War Powers Act. See remarks of Mr. Celler, Mr. Springer, and Mr. Michener.

The House committee had also held hearings both on H. R. 4840, the predecessor to H. R. 5089 (Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 78th Cong., 2d Sess., on H. R. 4840) and on the bill which became Public Law No. 322 (see pp. 52–53, *infra*) (Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 79th Cong., 1st Sess., on H. R. 3750). The Senate committee had held no hearing on either bill.

taken in this field since the First War Powers Act, 1941, was enacted reveals that it proceeded upon the assumption that Section 5 (b) has the effects which the Custodian has attributed to it. Public Law No. 322, 79th Cong., 2d Sess., March 8, 1946, added Section 32 to the Trading With the Enemy Act. In that Section, Congress empowered the Executive to return vested property where such a return was found to be in the national interest and where certain other conditions were satisfied. The Section provided, however, that such returns might not be made to certain defined classes of persons, including some who would be enemies within the definition of Section 2 of the Act and including in addition foreign corporations and associations which were controlled by, or 50% of the stock of which was owned by, persons themselves ineligible for return (Section 32 (a) (2) (E)). The Report of the House Judiciary Committee pointed out that "the bill would not permit any property to be returned to enemy nationals in enemy or former occupied countries or to foreign corporations owned or controlled by such nationals." H. Rep. No. 1269, 79th Cong., 1st Sess., p. 2. Pointing out further that return would be permitted to domestic corporations, the report added that while in some cases property could now be returned to such corporations, "authority is needed to return * * * to corporations in which there existed only minor-

ity American interests" (*ibid.*, p. 3).[26] The Report of the Senate Judiciary Committee is to the same effect. See S. Rep. No. 920, 79th Cong., 2d Sess., pp. 2, 3.

The enactment of Public Law No. 322 thus necessarily assumed that the remedy of return under Section 9 (a) was not available to domestic or foreign corporations which were owned or controlled by persons who were enemies under the defintion of Section 2 of the Trading With the Enemy Act as it was applied during and after World War I. Such corporations would not themselves have been enemies under that definition; enemy character arose only by virtue of incorporation in, or doing business within, enemy territory, and stock ownership or control by enemies had been held irrelevant. *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457.[27] If, therefore, the remedies of Section 9 (a) were available to all non-enemies, as the court below has held, such

[26] Under the definitions of Executive Order No. 8785, a domestic corporation is a national of a foreign country if it is controlled by, or a substantial part of its securities or obligations are owned or controlled by, such nationals. Section 5E (ii), Appendix A, *infra*, p. 81. Where the foreign stock or security interests were not "substantial," and the corporation was not controlled by foreign nationals, return of the corporate property could thus be made under Section 9 (a) on the ground that the corporation was not a foreign national.

[27] Corporations and associations organized under the laws of an enemy nation were expressly disqualified from return by Section 32 (a) (2) (B) as added by Public Law No. 322.

corporations could have secured the return of vested property either by administrative action or judicial decree as that Section provides. There would have been no occasion for the statements by the committees of Congress that "authority is needed to return" to domestic corporations whose stock had been enemy owned, and there would have been no need for the specific provisions by which return in such cases was authorized.

III

AS THUS CONSTRUED, THE ACT IS CONSTITUTIONAL

A major consideration which appears to have led the court below to adopt its nugatory construction of Section 5 (b) was its view that accepting the Section as an authorization to retain non-enemy foreign property would "raise grave doubts as to the constitutionality of the law" (R. 9). We submit that the doubts are of the court's own making—the result of its holding, contrary to the decision of the Circuit Court of Appeals for the Second Circuit in *Silesian-American Corp.* v. *Markham*, No. 346, *supra*, that the remedy of Section 9 (a) is exclusive so that to deny it to foreign nationals would leave them without remedy.

We think that a remedy of full constitutional adequacy is available to any foreign national claimant whose property is constitutionally protected from uncompensated taking. *Cf. Russian*

Volunteer Fleet v. *United States*, 282 U. S. 481, 489. It is well settled that a taking, authorized by Congress, of private property protected by the Fifth Amendment gives rise to an implied promise to pay just compensation which may form the basis of a suit against the United States in the Court of Claims (or the appropriate District Court if the amount is less than $10,000) under the Tucker Act, Judicial Code §§ 24 (20), 145 (1); 28 U. S. C. 41 (20), 250 (1). *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Palmer*, 128 U. S. 262; *Hurley* v. *Kincaid*, 285 U. S. 95; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18. It cannot be doubted that such a suit affords a remedy fully adequate to protect all constitutional rights. *Hurley* v. *Kincaid*, *supra*; *Yearsley* v. *Ross Construction Co.*, *supra*; *cf. Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79–80. Here all the conditions prerequisite to the maintenance of a suit for just compensation are present. The property being that of a foreign national, absolute title has vested in the United States subject to no duty to return and the former owner is left with no beneficial right to or interest in the property. *Cf. Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120–21. Any return which might be made under Public Law No. 322 or under future enactments of Congress (see p. 30, *supra*) would be a disposition of property of the United States made as a matter of grace, and the possibility of

such a return does not detract from the absolute character of the title acquired by the United States. *Cummings* v. *Deutsche Bank, supra.* There can, moreover, be no question that the vesting and retention of the property was authorized by Congress. (See Point I, *supra.*) And there is nothing in the circumstances of the vesting to repel the normal implication of a promise to pay whatever compensation the Constitution might require should the property fall in fact within the Custodian's authority to vest and retain, for the vesting orders in suit provide, with unimportant variations in phraseology, that the vesting of the property

> * * * shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, *or to indicate that compensation will not be paid in lieu thereof* * * *. [Italics supplied.]

The court below held, however, that the remedy of a suit for just compensation was not available because of the provision of Section 7 (c) of the Trading With the Enemy Act that

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and

> in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

This provision, added by the Act of November 4, 1918, 40 Stat. 1021, was enacted at a time when the subject of the seizure power was enemy property only, the uncompensated seizure of which resulted in no possible violation of constitutional rights. The only case then calling for a remedy was one in which the Custodian's determination that the property was within the stated power to seize and retain was found to be incorrect. For such a case the appropriate remedy was to undo the seizure so far as possible by providing for the return of the property by administrative action or suit under Section 9 (a) and by requiring that it be kept by the Custodian while such suit was pending. The quoted provision of Section 7 (c) rounded out the scheme by insuring that the specific property, while in the Custodian's hands, could not be reached except by a proceeding under Section 9 (a), and by precluding the possibility that the United States, in addition to its duty to return the property or its proceeds, might be held liable by way of damages for the consequences of the Custodian's honest mistake.

These functions Section 7 (c) may appropriately continue to perform without any collision with the

new provisions of Section 5 (b). As before, a claimant whose property was not within the stated power to vest and retain is restricted to the remedy of Section 9 (a); if the claimant can establish that the Custodian was wrong in determining that the property was property of a foreign national, he can secure the return and is precluded from recovering anything more by way of damages. And, as before, the only way in which the specific property vested may be reached while in the Custodian's hands is by such suit under Section 9 (a) with its attendant requirement that the property be held until the suit is terminated. Thus Section 7 (c) may properly continue to reinforce the exclusive character of the remedy of return where that remedy is available. But we see no justification for attributing to it the new function of denying all remedy in cases where the remedy of return is not available because Congress has authorized the retention of the property, but where the property is constitutionally protected from seizure without payment of compensation.

The text of this provision of Section 7 (c) shows that it was not intended to serve such a function. On its face it would appear to be inapplicable to the claim of a foreign national for just compensation. In terms it purports only to limit the remedy available to persons who have "a claim to money or other property" in the hands of the Custodian, *i. e.*, a claim to the specific

property vested. And this emphasis on the specific property vested is reinforced by the further provision that in the event of sale of the specific res, its proceeds shall be substituted for it, and the claim to recovery shall be enforced against the proceeds. As the court said in *Sigg-Fehr* v. *White*, 285 Fed. 949, 952 (App. D. C.), a case involving property vested during World War I, the provision "relates only to claimants who are not enemies or allies of enemies"—*i. e.*, those who were then given by Section 9 (a) an express claim to the specific money or property vested or its proceeds. Here the foreign national claimant is not a person having a claim to the money or property vested. Since the vesting and retention of his property is specifically authorized by Section 5 (b), he is left without any interest in, or claim to, the property vested. Any suit he might bring for just compensation would necessarily proceed on the assumption that full and indefeasible title to the money or other property has passed to the United States, for only thus could he show the "taking" upon which such a suit must be founded. It would therefore be not a claim "to any money or other property" in the Custodian's hands, but a claim for pecuniary redress based on the premise that the specific money or property is beyond the reach of the claimant.

Nor do the decisions under the Act as it stood prior to amendment of Section 5 (b) by the First.

War Powers Act support a different construction. *Sigg-Fehr* v. *White, supra,* and *Pflueger* v. *United States,* 121 F. 2d 732 (App. D. C.), certiorari denied, 314 U. S. 617, referred to by the court below, were both suits under Section 9 (a). The only question presented was whether the claimant, in addition to recovering the proceeds of sale of the vested property, could recover a further amount based on the alleged inadequacy of the sale price. The decisions rested solely on the proposition that the express remedy of Section 9 (a), where available, must be followed according to its terms. *Becker Steel Co.* v. *Cummings,* 95 F. 2d 319 (C. C. A. 2), certiorari denied, 305 U. S. 604, was a similar case. There the claimant had, in a prior Section 9 (a) suit, recovered the proceeds after deduction of the Custodian's expenses of sale; the court held merely that while those expenses should not have been deducted from the previous recovery, that recovery barred further proceeding under Section 9 (a), and Section 7 (c) precluded any other remedy for a claimant who was entitled to the remedy of Section 9 (a).[28] *Escher* v. *United States,* 68 Ct. Cls. 473, certiorari

[28] The court that decided the *Becker Steel* case has since held that the Trading With the Enemy Act, if construed to deny to foreign nationals the right to recover vested property by suit under Section 9 (a), is nevertheless constitutional because of the availability to such a foreign national of the remedy of suit under the Tucker Act for just compensation. *Silesian-American Corp.* v. *Markham, supra.*

denied, 281 U. S. 752, involved the same claimants as did the *Sigg-Fehr* case, *supra*. The claimants, who had already recovered the proceeds of their property in the Section 9 (a) proceeding, sought to recover in the Court of Claims the additional amounts which had been denied in the *Sigg-Fehr* case. The court held that, apart from principles of res judicata, it was without jurisdiction over such a claim because Congress had expressly provided a different remedy which was available to the claimants.

In all of the foregoing cases, the claimants had claims to the specific property vested or its proceeds. To have allowed recovery by way of just compensation in such cases would have been to ignore the requirement of an authorized taking as a condition of recovery, and to treat the United States either as an involuntary purchaser of property which Congress had not authorized the Custodian to retain but had rather directed him to return, or else as liable for damages arising from a purely possessory taking of property which the claimant could have recovered at any time by bringing suit under Section 9 (a). These decisions and the quoted provision of Section 7 (c) thus relate to property whose retention was not authorized by the Act and presuppose the availability of the express statutory remedy of return. Nothing in them would appear to be relevant to the new problem, created for the first time by

the 1941 amendments to Section 5 (b), of the remedies available to redress an authorized taking of constitutionally protected property in respect of which the remedy of return is unavailable, and nothing in them would appear to preclude resort to the normal remedy of a suit for just compensation to redress such an authorized taking.

Even if the terms of Section 7 (c) on their face more clearly barred suit for just compensation, we submit that they should not now be allowed to interfere with the full realization of the purposes which Congress embodied in the First War Powers Act, 1941. The normal presumption is that Congress intended the policies declared in that Act to be effective. *Cf. United States v. Powers*, 307 U. S. 214, 217; *Gemsco, Inc. v. Walling*, 324 U. S. 244, 255, 258. That presumption is here reinforced by the fact, already adverted to, that in enacting the First War Powers Act, 1941, Congress did not address itself to the problem of the remedies available to persons whose property had been vested, and disclaimed any consideration of the older provisions of the Act and any attempt to eliminate possible inconsistencies between those provisions and its new enactment. Its evident purpose was that the new provisions of Section 5 (b) should form the keystone of the program of foreign property control during World War II, and that while so far as possible the old and the new were to "function as parts of an integrated whole," the new was to prevail in the

event of any conflict. There is nothing in the legislative history of the First War Powers Act to suggest that in authorizing the vesting and retention of property of non-enemy foreign nationals, Congress intended to leave such nationals without remedy, much less that it would have preferred that Section 5 (b) be declared unconstitutional rather than permit resort by a foreign national to the traditional remedy of a suit for just compensation. To the extent that Section 7 (c), if construed as the court below has construed it, would render the policy of Section 5 (b) ineffective by tainting the vesting and retention of property of foreign nationals with unconstitutionality, respect for the indicated Congressional purposes requires that Section 7 (c) be deemed superseded by the newer enactment.

IV

THE ACT IN NO WAY CONFLICTS WITH THE TREATY OF 1850 WITH SWITZERLAND

In the court below, the respondent contended that Article I of the Treaty of Friendship, Commerce and Extradition between the United States and Switzerland, of November 25, 1850, 11 Stat. 587, required that it be allowed to recover its property if an American citizen could in like situation secure a return of property. The court below did not refer to the treaty. Nevertheless, we think it appropriate to point out the reasons why the treaty has no bearing on this case.

Briefly stated, the treaty provides in Article I (see Appendix B, *infra*, pp. 91–92) that the citizens of either country "shall be admitted and treated upon a footing of reciprocal equality in the two countries." The citizens of each are to have liberty to come and go within, take up residence in, acquire and possess property in, and exercise their professions, industry, and commerce in the other country and to have "free access to the tribunals." "No pecuniary or other more burdensome condition" is to be "imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country in which they reside, nor any condition whatever to which the latter shall not be subject." Article II of the treaty provides in part that "in case of war, or of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained."

At the outset, it should be pointed out that the respondent is not within the protection of any of these provisions. The protection of both Articles extends in terms only to "citizens." The Department of State has authoritatively taken the position that "these references to 'citizen' in Article I and II are to natural persons and they could have no application to corpora-

tions," and has pointed out that it has been the general practice in such treaties either to make no provisions regarding corporations or else to grant to corporations limited privileges different from those granted to natural persons. Letter dated January 3, 1934, from Acting Secretary of State Phillips to the Swiss Minister, MS. Dept. of State, File No. 811.5034/157, quoted in III Hackworth, *Digest of International Law*, 431–2, set out in Appendix B, *infra*, pp. 92–94. The construction given the treaty by the Department of State is entitled to the greatest weight (*Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295) and that construction is here supported not only by the historical and textual considerations set forth in the letter of the Acting Secretary of State, but also by the persuasive analogy of the decisions of this Court holding that the "privileges and immunities of citizens" which are protected by Article IV, Section 2, of the Constitution and of Section 1 of the 14th Amendment, are those of natural persons only. *Bank of Augusta* v. *Earle*, 13 Pet. 519, 586–7; *Blake* v. *McClung*, 172 U. S. 239, 259; *Hemphill* v. *Orloff*, 277 U. S. 537, 548–50; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 514.[29]

[29] In addition, the provisions of Articles I and II quoted above indicate on their face that they are intended only to protect citizens of Switzerland resident in or actively doing business in the United States. *Cf. Madiorano* v. *Baltimore &*

The Swiss treaty can thus have force in the present case only as an aid to the construction of Section 5 (b) on the assumption that Congress cannot be presumed to have legislated in derogation of the treaty rights of other potential claimants who might bring themselves within its protection. If there were conflict between Section 5 (b) and the treaty provision, Section 5 (b), being later, would prevail. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 720–21; *Sanchez* v. *United States*, 216 U. S. 167, 175–6; *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160.[30]

Ohio R. R. Co., 213 U. S. 268, 274; *Stoehr* v. *Wallace*, 255 U. S. 239, 251; *Junkers* v. *Chemical Foundation*, 287 Fed. 597, 598 (S. D. N. Y.). Nothing in the complaint suggests that the respondent maintains a place of business in the United States or engages actively in any trade or business in the United States, other than to serve as a holding company for securities of American corporations.

[30] This rule is here reinforced by the express provision of Article I that all of the rights and privileges conferred by that Article are subject to the limitation that they "shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal of the contracting parties"—a provision which would appear to comprehend subsequent as well as existing legislation. See *State ex rel. Tanner* v. *Staeheli*, 112 Wash. 344, 350–1, 192 P. 991, 994; *Instant Index Corp.* v. *Tribunal of the Canton of Vaud*, 60 Entscheidungen des Schweizerischen Bundesgerichts, I, p. 220 (1934), Annual Digest and Reports of Public International Law Cases, 1933–34 (1940), pp. 307–309. Compare Article VII of the Treaty of 1800 with France, 8 Stat. 180, 182, on which this provision was said to have been patterned, 5 Miller, *Treaties and Other International Acts of the United States of America*, 887 (quoting a letter from the President and Chancellor of the Swiss Confederation to the American negotiator).

But we submit that there is no possible conflict with any of the provisions of the treaty. Plainly the denial of the substantive right to recover vested property is not a denial of access to the courts within the meaning of Article I; Swiss nationals may have their day in court both in the district court in proceedings under Section 9 (a), and in the Court of Claims or the district court under the Tucker Act. *Cf. Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 274; *Valk* v. *United States*, 29 Ct. Cls. 62, affirmed, 168 U. S. 703.

Nor does the Act violate any substantive rights guaranteed to Swiss citizens by the treaty. In practice the Custodian has not adopted a policy of vesting Swiss property generally. The vesting power has ordinarily been exercised, as we have seen, only where the property was believed to have been infected with an enemy taint, a circumstance which would warrant vesting and retention if an American were the nominal holder of the property. Executive Order No. 8785, Sec. 5E, Appendix A, *infra*, p. 81; *Draeger Shipping Co.* v. *Crowley*, 55 F. Supp. 906 (S. D. N. Y.) And in the extraordinary cases in which Swiss property with no enemy taint may have been vested, the application of the Act is no more than an exercise of the paramount power of the United States to take any property, American or foreign, upon payment of just compensation. The pro-

vision of Article II quoted above expressly contemplates that Swiss property may be subjected to the condition of "expropriation" and guarantees not return of the property, but merely the payment to Swiss citizens of the same "indemnities for damages" as are awarded to American citizens.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed with directions to reinstate the judgment of the district court.

Respectfully submitted,

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APPENDIX A

Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended. (50 U. S. C. App. 1–31):

* * * * *

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy"

The words, "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

* * * * *

Sec. 5. [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b)]:

* * * * *

(b) (1) During the time of war or during any other period of national emer-

gency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts

incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * *

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]:

* * * * * *

(c) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom

and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

SEC. 9 [as amended]:

(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed

the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 32 [as added by Pub. L. No. 322, 79th Cong., 2d Sess., Mar. 8, 1946 and amended by Pub. L. No. 671, 79th Cong. 2d Sess., August 8, 1946]:

(a) The President, or such officer or agency as he may designate, may return

any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

(A) the government of a nation with which the United States has at any time since December 7, 1941, been at war; or

(B) a corporation or association organized under the laws of such nation:

Provided, That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be returned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer

to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof) and if such ownership was by one or more citizens of the United States or by one or more corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further*, That such owner or owners shall succeed to those obligations, limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of a nation with which the United States has not at any time since December 7, 1941, been at war: *Provided*, That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation of such nation discriminating against political, racial or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of a nation with which the United States has at any time since December 7, 1941, been at war, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D), return may be made to an individual who, as a consequence of any law, decree or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941, and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation; or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided*, That notwithstanding the provisions of this subdivision (E) a return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was

occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section;

and

(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89–96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

(5) that such return is in the interest of the United States.

Tucker Act, Judicial Code, § 24 (20), § 145 (1); 28 U. S. C. 41 (20), § 250 (1):

> SEC. 24:
>
> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> (20) Suits against United States.
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States * * *.
>
> SEC. 145:
>
> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) Claims against United States.
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States. * * *.
>
> * * * * *

Executive Order No. 8785, June 14, 1941, 6 F. R. 2897, as amended by Executive Order No. 8832, July 26, 1941, 6 F. R. 3715:

> * * * * *
>
> Executive Order No. 8389 of April 10, 1940, as amended, is amended to read as follows:
>
> * * * * *
>
> SECTION 3. The term "foreign country designated in this Order" means a foreign

country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

(a) April 8, 1940—
Norway and
Denmark;

(b) May 10, 1940—
The Netherlands,
Belgium and
Luxembourg;

(c) June 17, 1940—
France (including Monaco);

(d) July 10, 1940—
Latvia,
Estonia and
Lithuania;

(e) October 9, 1940—
Rumania;

(f) March 4, 1941—
Bulgaria;

(g) March 13, 1941—
Hungary;

(h) March 24, 1941—
Yugoslavia;

(i) April 28, 1941—
Greece;

(j) June 14, 1941—
Albania,
Andorra,
Austria,
Czechoslovakia,
Danzig,
Finland,
Germany,
Italy,
Liechtenstein,
Poland,
Portugal,

San Marino,
Spain,
Sweden,
Switzerland, and
Union of Soviet Socialist Republics;

(k) June 14, 1941—
China, and
Japan.

The "effective date of this Order" with respect to any foreign country not designated in this Order shall be deemed to be June 14, 1941.

* * * * *

SECTION 5.

* * * * *

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

Executive Order No. 9095, March 11, 1942, 7 F. R. 1971:

* * * * * *

2. All power and authority conferred on the President by Sections 3 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by Sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941, except such powers and authority as were delegated to the Secretary of the Treasury by Executive Orders issued prior to February 12, 1942, and to the Board of Governors of the Federal Reserve System by Executive Order No. 8843 of August 9, 1941 (which powers and authority shall continue to be vested in and exercised by the Secretary of the Treasury and the Board of Governors respectively), are hereby delegated to and vested in the Alien Property Custodian. The memorandum of February 12, 1942, delegating to the Secretary of the Treasury certain powers and authority under said sections, is hereby revoked and canceled. * * *

3. Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct; and, in the case of any property, or interest therein, subject to the control of the Secretary of the Treasury, when the Alien Property Custodian shall notify the Secretary of the Treasury in writing that he has so directed, the Secretary of the Treasury shall release all con-

trol of any such property, or interest therein, to the Alien Property Custodian.

4. Any outstanding order, proclamation, regulation, ruling, license, or instruction issued pursuant to, or relating to the administration of, any power or authority vested in the Alien Property Custodian by this Order shall remain in effect unless and until amended or revoked by the Alien Property Custodian.

Executive Order No. 9193, July 6, 1942, 7 F. R. 5205:

* * * * * *

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

* * * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is

evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

(d) any patent, patent application, design patent, design patent application, copyright, copyright application, trademark or trademark application or right related thereto in which any foreign country or national thereof has any interest and any property of any nature whatsoever (including, without limitation, royalties and license fees) payable or held with respect

thereto, and any interest of any nature whatsoever held therein by any foreign country or national thereof;

(e) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; and

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian.

3. Subject to the provision of this Executive Order, all powers and authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended, are hereby delegated to the Secretary of the Treasury or any person, agency, or instrumentality designated by him; *provided, however,* that when any property or interest, not belonging to a foreign government or central bank, shall be vested by the Secretary of the Treasury, such property or interest shall be vested in, and dealt with by, the Alien Property Custodian upon the terms directed by the Secretary of the Treasury. Except as otherwise provided herein, this Executive Order shall not be

deemed to modify or amend Executive Order No. 8389, as amended, or the President's Proclamation of July 17, 1941, or Executive Order No. 8839, as amended, or the regulations, rulings, licenses and other action taken thereunder, or in connection therewith.

4. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order. The Secretary of the Treasury and the Alien Property Custodian each shall make available to the other all information in his files to enable the other to discharge his functions, and shall keep each other currently informed as to investigations being conducted, with respect to enemy ownership or control of business enterprises within the United States.

* * * * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency or instrumentality designated by him all powers and authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive

Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 shall be administered by him in conformity with the provisions of this Executive Order.

* * * * *

8. All records and other property (including office equipment) of the Treasury Department which are used primarily in the administration of powers and duties to be exercised by the Alien Property Custodian, and such personnel as is used primarily in the administration of such powers and duties and which was hired by the Treasury Department after September 1, 1941 (including officers whose chief duties relate to the administration of such powers and duties), as the Secretary of the Treasury and the Alien Property Custodian shall jointly certify for transfer, shall be transferred to the Office of the Alien Property Custodian. In the event of disagreement concerning the transfer of any personnel, records, or property, the determination shall be made by the Director of the Bureau of the Budget, pursuant to the formula here prescribed. * * *

9. This Executive Order shall not be deemed to modify or amend Executive Order No. 8843 of August 9, 1941, and the regulations, rulings, licenses and other action taken thereunder. Any and all action heretofore taken by the Secretary of the Treasury or the Alien Property Custodian, or by any person, agency, or instrumentality designated by either of them, pursuant to sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended, or pursuant to prior Executive Orders, and any and all action heretofore taken by the Board of Governors of the Federal Reserve System pursuant to Executive Order No.

8843 of August 9, 1941, are hereby confirmed and ratified.

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended.

(b) The term "business enterprise within the United States" shall mean any individual proprietorship, partnership, corporation or other organization primarily engaged in the conduct of a business within the United States, and any other individual proprietorship, partnership, corporation or other organization to the extent that it has an established office within the United States engaged in the conduct of business within the United States.

* * * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No persons affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise

excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

13. Any regulations, rulings, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under sections 3 (a) or 5 (b) of the Trading with the enemy Act, as amended, shall be conclusively presumed to have been issued, made or taken after appropriate consultation as herein required and after appropriate certification in any case in which a certification is required pursuant to the provisions of this Executive Order.

APPENDIX B

Treaty of November 25, 1850 with Switzerland, 11 Stat. 587:

ARTICLE I

The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland, as well as the members of their families, subject to the constitutional and legal provisions aforesaid, and yielding obedience to the laws, regulations, and usages of the country wherein they reside, shall be at liberty to come, go, sojourn temporarily, domiciliate or establish themselves permanently, the former in the cantons of the Swiss Confederation, the Swiss in the States of the American Union, to acquire, possess, and alienate therein property, (as is explained in article V;) to manage their affairs; to exercise their profession, their industry, and their commerce; to have establishments; to possess warehouses; to consign their products and their merchandise, and to sell them by wholesale or retail, either by themselves or by such brokers or other agents as they may think proper; they shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights

before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

* * * * *

ARTICLE II

* * * * *

In case of war, or of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.

* * * * *

Letter from the Acting Secretary of State (Phillips) to the Swiss Minister (Peter), January 3, 1934, M. S. Department of State, file 811.5034/157, as quoted in III Hackworth, *Digest of International Law*, 431–2:

* * * It is the view of this Government that the provision of the treaty referred to above [Article II, paragraph 2, of the treaty of friendship and commerce between the United States and Switzerland signed Nov. 25, 1850] has no application to corporations. Consequently, no conflict may arise between the tax imposed by Section 213 of

the National Industrial Recovery Act and the provisions of the treaty.

* * * * * *

An examination of the language of the 1850 treaty clearly shows that the use of the word "citizen" did not contemplate that the term should include corporations. For example, in Article I of the treaty the word "citizen" is used as follows:

"The citizens of the United States and the citizens of Switzerland, as well as the members of their families * * *."

Citizens are given the liberty to "exercise their profession." The privileges conferred on citizens by Article I "shall not extend to the exercise of political rights."

Article II of the treaty provides in the first paragraph that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service."

Obviously, these references to "citizen" in Articles I and II are to natural persons and they could have no application to corporations. The term "citizens" as used in Articles III, IV and V could apply only to natural persons.

It would indeed be a strained interpretation to contend that the term "citizens" has a different and broader meaning in the second paragraph of Article II than it obviously has in Articles I, III, IV and V and in the first paragraph of Article II.

It is believed to be clear from the language of the treaty that corporations are not included within the scope of the term "citizens" which appears in the second paragraph of Article II. Since the question has been raised, however, as to the manner in which treaties should be interpreted, it may be observed that specific

reference is not made to corporations in Article II of the treaty. An examination of the correspondence leading to the conclusion of the treaty fails to reveal any reference to corporations. Until comparatively recent years American interests in foreign countries and foreign interests in the United States were almost wholly those of natural persons rather than of corporations. In the middle of the Nineteenth Century it was not the practice to incorporate provisions regarding corporations in treaties concluded by the United States with foreign governments.

A number of treaties entered into by the United States in recent years contain limited provisions regarding corporations. Under these treaties, corporations are regarded as having only such privileges as are specifically prescribed for them. They are not regarded as deriving from these treaties privileges granted to citizens generally.

For example, in the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed December 8, 1923, provisions regarding corporations have been dealt with under separate articles, rather than assimilating corporate treaty rights to those of natural persons. Reference is made to Articles XII and XIII of the treaty with Germany.

It has been deemed inadvisable to grant in treaties the same privileges to corporations as are granted to natural persons, because it is within the power of the several states in the United States to prescribe the conditions on which foreign corporations may do business within the states. It has not generally been considered desirable to limit the powers of the state in such matters by treaty.

APPENDIX C

VESTING ORDER NUMBER 14

VESTING CERTAIN SHARES OF STOCK OF SPUR DISTRIBUTING CO. INC.

Under the authority of Section 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended by Sec. 301 of the First War Powers Act, 1941, and pursuant to Executive Order No. 9095 of March 11, 1942, the undersigned, finding upon investigation that 73,039 shares of the common stock of Spur Distributing Co. Inc. (a Delaware corporation) registered in the name of Houvis & Co. and deposited with American National Bank, Nashville, Tennessee as collateral for a loan made to Fritz von Opel are the property of Nationals of a Foreign Country designated in Executive Order No. 8389, as amended, as defined therein, and that the action herein taken is in the public interest, hereby directs that such property including any and all interest therein shall be and the same hereby is vested in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof, or to

indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, claiming any interest in any or all of such property and/or any person asserting any claim as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form No. APC–1 within one year from the date of this order, or within such further time as may be allowed by the Alien Property Custodian.

Executed at Washington, D. C. on June 4, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

[F. R. Doc. 42-5408; Filed, June 9, 1942; 2:54 p. m.]
[7 F. R. 4399 (Number 114, June 11, 1942)]

AMENDATORY AND SUPPLEMENTAL ORDER NUMBER 1 TO VESTING ORDER NUMBER 14

RE: SPUR DISTRIBUTING CO., INC.

First

Under the authority of the Trading with the enemy Act, as amended, and the authority vested by the President in the Alien Property Custodian, and pursuant to law, the Alien Property Custodian:

(A) On June 4, 1942, issued Vesting Order Number 14 (7 F. R. 4399) finding that 73,039 shares of the common stock of Spur Distributing Co., Inc., (a Delaware corporation) registered in

the name of Houvis & Co., and deposited with American National Bank, Nashville, Tennessee, as collateral for a loan made to Fritz von Opel, was the property of Nationals of a Foreign Country, as defined in Executive Order No. 8389, as amended, and declaring that such property including any and all interest therein was vested in the Alien Property Custodian;

(B) Hereby amends Vesting Order Number 14 as follows and not otherwise by finding and determining that the "Nationals of a Foreign Country" therein mentioned were at the time of the vesting and now are Wilhelm von Opel, Marta von Opel, Uebersee Finanz-Korporation, Aktien Gesellschaft, Fritz von Opel, Elinor von Opel Sachs and the issue of Elinor von Opel Sachs, and that they were and are nationals of a foreign country, namely Germany.

Second

(A) To the extent, if any, that any of the property listed in Section FIRST hereof, and full, complete and unqualified legal and equitable title, therein and thereto, was not vested in the Alien Property Custodian on June 4, 1942, by Vesting Order Number 14, the undersigned under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, and after investigation,

Finding:

1. That in accordance with an agreement dated October 5, 1931, signed by Wilhelm von Opel, Marta von Opel and Fritz von Opel, a usufrucht estate was created for Wilhelm and Marta von

Opel with contingent interests in Fritz von Opel and Elinor von Opel Sachs, including their issue, with a further interest in Fritz von Opel of twenty percent of the dividends and interest of the usufrucht estate;

2. That in accordance with the aforesaid agreement, dated October 5, 1931, all of the capital stock of Uebersee Finanz-Korporation, Aktien Gesellschaft, a corporation organized under the laws of Switzerland, is a part of said usufrucht estate and is therefore beneficially owned by Wilhelm and Marta von Opel, with contingent interests in Fritz von Opel, Elinor von Opel Sachs and their issue;

3. That of the total outstanding capital stock of Spur Distributing Co., Inc., a corporation organized under the laws of the State of Delaware and a business enterprise within the United States, consisting of 139,000 shares of no par value common stock, 73,039 shares (52%) registered in the name of Houvis & Co., are also a part of said usufrucht estate and are held by Uebersee Finanz-Korporation, Aktien Gesellschaft, for the benefit of said Wilhelm and Marta von Opel, Fritz von Opel, Elinor von Opel Sachs and their issue, and are evidence of control of said business enterprise;

4. That Uebersee Finanz-Korporation, Aktien Gesellschaft, is acting for or on behalf of and is controlled by Wilhelm and Marta von Opel;

5. That Wilhelm von Opel and Marta von Opel, whose last known addresses are Ruesselsheim, Germany, are nationals of a designated enemy country (Germany);

6. That Fritz von Opel, a subject of Germany and a citizen of Liechtenstein, has been interned

by order of the Attorney-General of the United States and is acting directly or indirectly for the benefit or on behalf of a designated enemy country (Germany) or persons within such country, and that said Fritz von Opel has no issue;

7. That Elinor von Opel Sachs, whose last known address was Germany, is a national of a designated enemy country (Germany);

8. That the issue of Elinor von Opel Sachs, whose last known addresses are Schweinfurt, Germany, are nationals of a designated enemy country (Germany);

and determining:

9. That Uberesee Finanz-Korporation, Aktien Gesellschaft is controlled by or acting for or on behalf of Wilhelm von Opel and Marta von Opel and is a national of a designated enemy country (Germany);

10. That Fritz von Opel is acting for or on behalf of a designated enemy country (Germany) or persons within such country and is a national of a designated enemy country (Germany);

11. That Spur Distributing Co., Inc., is controlled by or acting for on on behalf of Wilhelm von Opel and Marta von Opel and is a national of a designated enemy country (Germany);

12. That to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Germany);

and having made all determinations and taken all action, after appropriate consultation and cer-

tification required by law, and deeming it necessary in the national interest,

HEREBY VESTS in the Alien Property Custodian the 73,039 shares of no par value common stock of Spur Distributing Co., Inc., registered in the name of Houvis & Co., including any and all interest therein, together with any declared and unpaid dividends thereon, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

(B) Such property so vested by paragraph (A) of this Section SECOND and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian. This order shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

(C) Any person except a National of a Designated Enemy Country, asserting any claim arising as a result of this Amendatory and Supplemental Order may, within one year from the date hereof, or within such further time as may be allowed, file with the Alien Property Custodian on Form APC–1 a notice of claim, together with a request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

(D) The terms "National", "Designated Enemy Country" and "Business Enterprise within the United States", as used herein, shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Third

This Amendatory and Supplemental Order is corrective of and supplemental to, and in no way diminishes, restricts or limits the force and effect of, said Vesting Order Number 14, (7 F. R. 4399) and nothing herein contained shall diminish, restrict or limit any rights, titles or interests vested in the undersigned, as Alien Property Custodian, pursuant to said Vesting Order Number 14.

Executed at Washington, D. C. on July 11, 1944.

[OFFICIAL SEAL]

(Signed) James E. Markham,
JAMES E. MARKHAM,
Alien Property Custodian.

[F. R. Doc. 44-10576; Filed, July 17, 1944; 10:54 a. m.]
[9 Fed. Reg. 8083 (July 18, 1944)]

VESTING ORDER NUMBER 17

VESTING 345,760 SHARES OF THE COMMON STOCK OF HARVARD BREWING COMPANY

Under the authority of Section 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended by Sec. 301 of the First War Powers Act, 1941, and pursuant to Executive Order No. 9095 of March 11, 1942, the undersigned, finding upon investigation that the property hereinafter

described is the property of Nationals of a Foreign Country designated in Executive Order No. 8389, as amended, as defined therein, and that the action herein taken is in the public interest, hereby directs that such property including any and all interest therein shall be and the same hereby is vested in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States; such property being described as follows:

345,760 shares of the common stock of Harvard Brewing Company (a Delaware corporation) registered and held in the following manner:

a. 125,000 shares registered in the name of Sigler & Company and deposited with Central Hanover Bank and Trust Company, 70 Broadway, New York, New York;

b. 109,000 shares registered in the name of and deposited with Dominick & Dominick, 115 Broadway, New York, New York;

c. 56,760 shares registered in the name of Lake and Company and deposited with Manufacturers Trust Company, 55 Broad Street, New York, New York; and

d. 55,000 shares registered in the name of Cudd and Company and deposited with The Chase National Bank of the City of New York, New York, New York;

all of the aforesaid 345,760 shares being held for the account of Arnold & S. Bleichroeder, Inc.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return

such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, claiming any interest in any or all of such property and/or any person asserting any claim as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form No. APC–1 within one year from the date of this order, or within such further time as may be allowed by the Alien Property Custodian.

Executed at Washington, D. C., on June 4, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

[F. R. Doc. 42-5411; Filed, June 9, 1942; 2:55 p. m.]
[7 F. R. 4402 (Number 114, June 11, 1942)]

AMENDMENT OF VESTING ORDER NUMBER 17

Vesting Order Number 17 of June 4, 1942 is hereby amended as follows and not otherwise:

(a) By deleting the figure "125,000" appearing in subparagraph (a) thereof, and by substituting therefor the figure "290,760"; and by inserting the word "and" at the end of subparagraph (a) thereof.

(b) By deleting subparagraphs (b) and (c) thereof.

(c) By redesignating subparagraph (d) thereof as subparagraph (b).

All other provisions of such Vesting Order Number 17 and all action taken on behalf of the undersigned in reliance thereon, pursuant thereto and under the authority thereof are hereby ratified and confirmed.

Executed at Washington, D. C. on August 6, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

[F. R. Doc. 42-7716; Filed, August 8, 1942; 11:08 a. m.]
[7 F. R. 6190 (Number 157, August 11, 1942)]

VESTING ORDER NUMBER 18

VESTING 100 SHARES OF THE COMMON CAPITAL STOCK OF WESTMINSTER INDUSTRIAL CORPORATION

Under the authority of Section 5 (b) of the Trading With the Enemy Act of October 6, 1917, as amended by Sec. 301 of the First War Powers Act, 1941, and pursuant to Executive Order No. 9095 of March 11, 1942, the undersigned, finding upon investigation that the property hereinafter described is the property of Nationals of a Foreign Country designated in Executive Order No. 8389, as amended, as defined therein, and that the action herein taken is in the public interest, hereby directs that such property including any and all interest therein shall be and the same hereby is vested in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for

the benefit of the United States; such property being described as follows:

100 shares of the common capital stock of Westminster Industrial Corporatoin (a New York corporation) held in trust by Erwin G. Schattman, 265 Cabrini Boulevard, New York, New York, for Overseas Finance Corporation, Ltd. of Liesthal, Switzerland.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, claiming any interest in any or all of such property and/or any person asserting any claim as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form No. APC–1 within one year from the date of this order, or within such further time as may be allowed by the Alien Property Custodian.

Executed at Washington, D. C. on June 4, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

[F. R. Doc. 42-5412; Filed, June 9, 1942; 2:55 p. m.]
[7 F. R. 4402 (Number 114, June 11, 1942)]

VESTING ORDER NUMBER 19

VESTING 300 SHARES OF THE COMMON CAPITAL STOCK OF AMERLAGENE, INC.

Under the authority of Section 5 (b) of the Trading With the Enemy Act of October 6, 1917, as amended by Sec. 301 of the First War Powers Act, 1941, and pursuant to Executive Order No. 9095 of March 11, 1942, the undersigned, finding upon investigation that the property hereinafter described is the property of Nationals of a Foreign Country designated in Executive Order No. 8389, as amended, as defined therein, and that the action herein taken is in the public interest, hereby directs that such property including any and all interest therein shall be and the same hereby is vested in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States; such property being described as follows:

> 300 shares of the common capital stock of Amerlagene, Inc. (a Delaware corporation) represented by Certificates numbered 1, 2 and 3, each for 100 shares.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be de-

termined that such return or compensation should be made.

Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, claiming any interest in any or all of such property and/or any person asserting any claim as a result of this order, may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form No. APC-1 within one year from the date of this order, or within such further time as may be allowed by the Alien Property Custodian.

Executed at Washington, D. C. on June 4, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

[F. R. Doc. 42-5413; Filed, June 9, 1942; 2:55 p. m.]
[7 F. R. 4403 (Number 114, June 11, 1942)]

VESTING ORDER NUMBER 36

VESTING 7,304 SHARES OF THE COMMON STOCK OF AJAX TRANSPORTATION COMPANY

Under the authority of Section 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended by Sec. 301 of the First War Powers Act, 1941, and pursuant to Executive Order No. 9095 of March 11, 1942, the undersigned, finding upon investigation that the property hereinafter described is the property of Nationals of a Foreign Country designated in Executive Order No. 8389, as amended, as defined therein, and that the action herein taken is in the public interest,

hereby directs that such property including any and all interest therein shall be and the same hereby is vested in the Alien Property Custodian, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States; such property being described as follows:

7,304 shares of the common capital stock of Ajax Transportation Company (a Missouri corporation) registered in the names of Hanns Frankenberg and Adolph Gaeng, nominees for Ubersee Finanz-Korporation, A. G. (Overseas Finance Corporation, Limited), and represented by certificate No. 15, together with all declared and unpaid dividends on the same.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, claiming any interest in any or all of such property and/or any person asserting any claim as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form No. APC–1 within one year from the date of this order, or within such further time as may be allowed by the Alien Property Custodian.

Executed at Washington, D. C. on June 30, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

[F. R. Doc. 42-6278; Filed, July 2, 1942; 4:19 p. m.]
[7 F. R. 5078; Number 131, July 4, 1942]

VESTING ORDER NO. 51

VESTING INTEREST OF UBERSEE FINANZ-KORPORATION, A. G., ET AL., IN CONTRACT WITH AMERLAGENE, INC.

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

(a) That the property described as follows:

All right, title and interest of Ubersee Finanz-Korporation, A. G., (Overseas Finance Corporation, Limited) and/or Arnhold and S. Bleichroeder, Inc., a New York corporation, in and to that certain contract executed under date of October 18, 1940 by and between said Arnhold and S. Bleichroeder, Inc.; and Amerlagene, Inc., a Delaware corporation,

is property within the United States owned or controlled by nationals of a designated enemy country (Germany); and

(b) That the property described as follows:

All income, profits and other property heretofore accrued or which may hereafter accrue to Ubersee Finanz-Korporation, A. G., (Overseas Finance Corporation, Limited) and Arnhold and S. Bleichroeder, Inc., a New York corporation, or either of

them, by virtue of the aforesaid contract dated October 18, 1940,

is part and parcel of the property hereinbefore described in sub-paragraph (a), but determining that to the extent, if any, that it is not, it is necessary for the maintenance or safeguarding of other property [namely, that hereinbefore described in sub-paragraph (a)] belonging to the same national of the same designated enemy country and subject to vesting (and in fact vested by this order) pursuant to Section 2 of said Executive Order;

and determining that to the extent that either or both of such nationals are persons not within a designated enemy country the national interest of the United States requires that they be treated as nationals of a designated enemy country, and having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it necessary in the national interest, hereby vests such property, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return should be made or such compensation should be paid.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC–1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constiute an admission of the existence, validity or right to allowance of any such claim.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Executed at Washington, D. C. on July 10, 1942.

(Signed) Leo T. Crowley,
LEO T. CROWLEY.

[F. R. Doc. 42–7887; Filed, August 13, 1942; 10:00 a. m.]
[7 F. R. 6503 (Number 162, August 18, 1942)]

U. S. GOVERNMENT PRINTING OFFICE: 1947

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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1946

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 934

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

The respondent's heavy reliance upon implications of Section 12 of the Trading with the Enemy Act calls for a brief reply. See, *e. g.*, Brief for Respondent, pp. 6, 20. The Government has made the argument, among others, that the express authorization to hold, use, administer, liquidate, sell, or otherwise deal with property of any foreign national in the interest and for the benefit of the United States, conferred by Section 5 (b), as amended, is fatal to the continued existence of any right in a foreign national to compel return by suit under Section 9 (a). The respondent has

sought to meet this argument by suggesting that similar authorization was conferred by Section 12 during World War I and that such authorization was never regarded during World War I as a barrier to recovery by a nonenemy in a suit under Section 9 (a). If Section 9 (a) permitted a nonenemy to recover during World War I in spite of the existence of powers in the Custodian on their face inconsistent with an obligation to return, why, the respondent asks, should a different result follow in World War II?

The answer lies in the premise upon which the question is asked. The assumption that Section 12 conferred powers whose exercise would have been inconsistent during World War I with the obligation to return nonenemy property is erroneous. Section 12 was addressed to enemy (and ally-of-enemy) property only. It was not contemplated that the powers there conferred would be exercised with respect to any property the Custodian was under an obligation to return. The full text of Section 12 makes this quite clear. The opening paragraph of Section 12 prescribes what shall be done with "moneys" received by the Custodian; the second, what shall be done with "all other property *of an enemy, or ally of enemy.*" Paragraph four, quoted in the Brief for Respondent, is merely an additional grant of powers with respect to "property, other than money," and in view of the scope which the

opening paragraphs establish for the Section, there is no reason why this paragraph should be read as comprehending nonenemy property where the remainder of the Section clearly does not.

This view is confirmed by the practicalities of administration of the Act during World War I. As the Act then stood, the Custodian's powers under Section 7 (c) were limited to the property of enemies of allies of enemies. In the exercise of the seizure power, he could, it is true, acquire dominion over property which he mistakenly determined to be that of an enemy or ally of enemy. But since Section 9 (a) afforded the exclusive procedure for testing the correctness of his determination, the presumption that he had acted within his statutory authority necessarily prevailed until suit was brought under Section 9 (a). Until such suit was brought, therefore, any property which the Custodian held was deemed to be enemy or ally-of-enemy property. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Miller* v. *Lautenberg*, 239 N. Y. 132, 145 N. E. 907. Thus, it was only with respect to property which was either enemy or ally-of-enemy property in fact, or deemed to be so by virtue of a presumption which had not been disturbed, that the powers of Section 12 could be brought to bear. The powers embodied in Section 5 (b) to hold, use, administer, liquidate, sell, or otherwise deal

with vested property, on the other hand, are expressly applicable to any property or interest of any foreign country or national thereof.

Thus, as a practical matter, Section 12 powers would normally be exercised only in respect of property which was in fact within the scope of the seizure power specified by Section 7 (c), *i. e.* enemy or ally-of-enemy property. In view of the absence in the contemplated practical operations under the Act of any need to exercise Section 12 powers with respect to any but enemy or ally-of-enemy property, it was quite appropriate to limit the application of those powers, as the opening paragraphs of the Section appear clearly to do, to enemy or ally-of-enemy property.

This is confirmed by the legislative history of the part of Section 12 upon which the respondent relies. Originally, Section 12 conferred upon the Custodian only the powers of a common law trustee with respect to property seized pursuant to Section 7 (c). 40 Stat. 423. The broader power permitting the Custodian to act "in like manner as though he were absolute owner thereof" was added by the Urgent Deficiency Appropriation Act of 1918. 40 Stat. 460. The then Alien Property Custodian, Mr. A. Mitchell Palmer, testified before a Senate Subcommittee on Appropriations that the added power was needed because without it, "enormous profits" would be accruing for the owners of seized property. When Senator Martin asked Mr. Palmer if he

meant that he was "doing business for the *German* people instead of for your own country," Mr. Palmer answered "Absolutely." Senator Tillman then expressed his regret that under the original act the Custodian was in effect "making money for those whelps over there." The hearings, we submit, leave no doubt that Congress regarded *German, i. e.* enemy property, as the subject matter to which Section 12 would apply. See Hearings before a Subcommittee of the Committee on Appropriations on H. R. 9867, 65th Cong. 2nd Sess.

We conclude, therefore, from the text of Section 12, its place in the scheme of the Act, and its legislative history that the powers it confers were not intended to have any significant application to property which the Custodian would have been obliged to return in a suit under Section 9 (a). This being so, there is no foundation for the respondent's contention that a grant of powers in World War II inconsistent with a right to return should leave the right to return unimpaired as it did in World War I. In short, there was no such grant of powers during World War I, the powers granted by Section 12 being addressed to enemy or ally-of-enemy property.

The powers conferred by Section 5 (b) to hold, use, administer, liquidate, sell, or otherwise deal with any property or interest of any foreign country or national thereof in the interest and for the benefit of the United States, are, in our

view, irreconcilable with the respondent's construction of the Act. If, as the respondent argues, Congress had granted a vesting power intended only to permit immobilization of foreign property, it would have been appropriate to have granted accompanying powers limited to custody and conservation of the property pending determination of its status by suit under Section 9 (a). That Congress cast the accompanying powers in terms of an affirmative authority to use and dispose of vested property is wholly inconsistent with the objective of mere immobilization.

We believe that even if the accompanying powers had not been expressly added to Section 5 (b), the vesting power alone would bar a foreign national from recovering by suit under Section 9 (a). When Congress added the vesting power to Section 5 (b), it must be presumed to have done a meaningful legislative act. If, in spite of vesting as authorized by Section 5 (b), a foreign national could compel return, the vesting power would add nothing to what could have been accomplished by using the freezing powers. We submit that this incongruity, coupled with the Committee's explicit statement that a major objective was to make *foreign* property available for affirmative use (See Brief for the Petitioner, pp. 18–21), would be sufficient—without the overwhelming confirmation afforded by the accom-

panying powers—to compel the result for which we contend.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
M. S. ISENBERGH,
Special Assistant to the Attorney General.

APRIL 1947.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts

payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of the Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: Provided, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time

and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: Provided further, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian

shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: Provided, however, That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: And provided further, That the Treasurer of the United States, on order of the alien property custodian, shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

U. S. GOVERNMENT PRINTING OFFICE: 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian, *Petitioner*,

v.

UEBERSEE FINANZ-KORPORATION, A. G., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

RICHARD J. CONNOR,
BART W. BUTLER,
Attorneys for Respondent.

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Bowen Building,
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Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian, *Petitioner.*

v.

UEBERSEE FINANZ-KORPORATION, A. G.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 7) is reported at 158 F. 2d 313. There was no opinion by the District Court.

JURISDICTION.

The jurisdiction of the Court of Appeals for the District of Columbia rests upon § 17 of the Trading with the Enemy Act. Its judgment was entered on October 21, 1946 (R. 11-12). Petition for a writ of certiorari was filed on January 20, 1947 and was granted on February 17, 1947 (R. 12). Jurisdiction of this Court rests on § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Section 5(b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, provides in part (*infra*, App. pp. 46-47):

> Any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *

Section 9(a) of the Trading with the Enemy act provides in part (*infra*, pp. 48-49):

> Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasury of the United States or the interest therein to which the court shall determine said claimant is entitled.

The question presented is whether amended § 5(b), has so amended, *by implication*, the *express* language of § 9(a) as to cut off the right of a friendly foreign national, suing in respect of property in which there is not a scintilla of enemy- or ally-of-enemy- interest or control, to pursue the remedy and obtain the relief provided by the explicit language of § 9(a).

STATUTES INVOLVED.

The relevant portions of the Trading with the Enemy Act, as amended, Executive Orders and Treaty are set forth in Appendix, p. 45, *et seq.*

STATEMENT.

By a series of vesting orders issued June and July, 1942, the Alien Property Custodian vested in himself certain shares of stock (consisting principally of the controlling interest in a brewery and the controlling interest in an independent chain of gasoline distribution stations) and a minor interest in a contract which were the property of respondent. On October 25, 1944 respondent filed a complaint in the District Court for the District of Columbia setting out that it had been organized under the laws of Switzerland in 1922 and was a citizen of Switzerland, alleging that it was neither an "enemy", "ally of enemy", or "national of a designated enemy country" within the meaning of the Trading with the Enemy Act or the Executive Orders issued pursuant thereto, and alleging further, as clearly and unequivocally as language permits, that no interest or control whatsoever, either direct or indirect, was owned by an "enemy", "ally of enemy", or "national of a designated enemy country" (R. 1-4), and prayed for the return of the seized property.

The Government moved to dismiss the complaint on the sole ground that the plaintiff was a national of a foreign country (R. 4-5). Thus, upon the pleadings the Government admitted that at and before the date of the seizure and at the time of filing its motion, respondent was a

friendly foreign national, in no wise acting as an agent or cloak for an "enemy" or "ally of enemy" or for a "national of a designated enemy country", and that the property involved was in no wise colored with any interest of an "enemy" or "ally of enemy" or of a "national of a designated enemy country".

The District Court granted the motion and dismissed the complaint (R. 5).

The Court of Appeals for the District of Columbia, one judge dissenting, reversed and remanded the cause for trial, holding that § 5(b), while permitting initially the vesting of property of foreign nationals did not preclude an action by a friendly foreign national for the return thereof under § 9(a) (R. pp. 7-12).

SUMMARY OF ARGUMENT.

Section 9(a) (*infra*, pp. 48-49) of the Trading with the Enemy Act in explicit language provides that suit for the return of its or his property may be brought against the Custodian by any person not an enemy or ally of enemy. Section 7(c) (*infra*, pp. 47-48) of the Act expressly provides that "the *sole* relief and remedy of any person having any claim to any money or other property," seized by the Custodian, "shall be that provided by the *terms* of this Act." (Italics supplied)

The language of neither 9(a) nor 7(c) was amended or in any wise changed by the amendment to § 5(b) which was effected by the First War Powers Act of December 18, 1941 (*infra*, pp. 46-47).

Thus the Trading with the Enemy Act itself expressly excludes any remedy in any forum other than in the United States District Courts and expressly precludes any other relief to a friendly foreign national, such as respondent, than that provided by § 9(a). Since a friendly foreign national is entitled to the protection of the Fifth Amendment in respect of his property which is non-enemy in character (*Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 489) and

since § 9(a) of the Trading with the Enemy Act embodies the sole and exclusive remedy in respect of such property seized by the Custodian, to deny such friendly foreign national the privilege of resort to § 9(a) would bring the seizure provisions of the Act into head-on conflict with the Fifth Amendment.

In the lower Court and in its brief in this Court (point III, p. 54 *et seq.*) petitioner seeks to surmount this Constitutional impasse by an argument that amended § 5(b) permits of an interpretation which would allow to respondent the right to suit for just compensation in the Court of Claims. The validity of this argument is categorically denied. This contention of the petitioner is crucial and since it cannot be supported petitioner's entire case, on its Motion to Dismiss, collapses.

The provisions of the treaty between the United States and Switzerland require that Swiss nationals be granted relief and remedy in our courts identical with that accorded to American citizens. Petitioner's attempted interpretation of the Act, in its denial of a remedy under § 9(a) to a Swiss national, which remedy is admittedly available to an American citizen, would cause a direct conflict with the treaty.

There is nothing whatsoever in the language of amended § 5(b) which is in any wise inconsonant with the express language of either § 9(a) or § 7(c). Petitioner's entire position rests entirely upon an insupportable theory of the repeal of these sections by pure implication. The pertinent portions of amended § 5(b) go no farther than to permit the taking of possession of, or at most, a defeasible title to, property of any foreign national and thereby to eliminate the necessity for the protracted investigation and the onerous responsibility of making the determination or finding by the Custodian that the property is actually owned or held for the benefit of an enemy or ally of enemy, which was required by § 7(c).

The provisions of amended § 5(b) relating to the sale or disposition of property seized or vested thereunder permit

no greater dominion over such property by the Custodian than was permitted by § 12 of the unamended Act in respect of property seized under § 7(c).[1]

In other words, just as a suit under § 9(a) effected an injunction against the exercise of the sale and disposition provisions of § 12, so a suit under § 9(a) continues to effect an injunction against the sale and disposition provisions embodied in amended § 5(b). In short, the sale and disposition provisions of amended 5(b) no more cut off the relief and remedy provided by § 9(a) than did the sale and disposition provisions of § 12 under the old Act. *Central Union Trust Company v. Garvan*, 254 U. S. 554, 569.

Despite its almost entire reliance upon these dispositive provisions of amended § 5(b) as a basis for the implied repeal of §§ 9(a) and 7(c), petitioner at no place in its brief even attempts to meet or dispose of the construction placed upon the dispositive provisions of § 12 in respect to seizures made under § 7(c).

In the actual administration of the Act, including amended § 5(b) thereof, the Alien Property Custodian interpreted the Act and the Executive Orders thereunder as herein contended for by the respondent. Despite the broad language of amended § 5(b) authorizing him to take the property of any foreign national, the Custodian in fact took over only such property as he suspected was owned or held for the benefit of an enemy or ally of enemy. He also set up within the Office of the Alien Property Custodian a Vested Property Claims Committee which returned property to foreign nationals upon investigation and determination that the same was not owned or held for an enemy or ally of enemy.

Despite repeated efforts to get the Congress to place its seal of approval upon petitioner's construction of amended § 5(b), Congress has not only steadfastly refused to do so,

[1] The term "unamended Act" is used as a matter of convenience to refer to the Trading with the Enemy Act as it existed prior to the amendment of §5(b) by Title III of First War Powers Act, Act of Dec. 18, 1941, 55 Stat. 839, U. S. C. App. Title 50, §5(b), U. S. C. App. Title 50, §§616-618.

but during its last session expressly insisted upon the construction of § 9(a) embodied in this brief.

In summary, the position taken by the attorneys presently representing the Custodian brushes aside the express language of §§ 9(a) and 7(c), brings about a head-on collision with the Fifth Amendment of the Constitution, presents a direct conflict with the Treaty with Switzerland, stretches the language of amended § 5(b) into an interpretation neither expressed nor intended by the Congress, throttles the administrative interpretation given to the Act and the Executive Orders thereunder by the Custodian himself, and flies into the teeth of the will of Congress expressed at its very last session and embodied in the following language of the Senate Committee Report (S. Rep. No. 1839, 79th Cong., 2d Sess.):

> The first amendment by the Committee strikes out line 11 on page 1 and down to and including line 16 on page 8 [the portion of the Bill which would have denied the right of a friendly foreign national to the relief and remedy of § 9(a)]. The purpose of this amendment is to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a). The Bill as thus amended preserves in full these rights under 9(a) which the friendly foreign national, together with the United States citizen, has had for more than 25 years under the Act. (Brackets supplied)

ARGUMENT.

I.

The Sole Relief and Remedy of the Respondent, a Friendly Foreign National, is that Provided by § 9(a) of the Trading with the Enemy Act.

(a) The Express Language of §§ 9(a) and 7(c) is Conclusive and Exclusive With Respect to Both Relief and Remedy.

By the express language of § 9(a) the only character of person having a disability to pursue the remedy and obtain the relief therein provided is an *enemy or ally of enemy*, as those terms are defined in § 2 of the Act:

> § 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover. (a) Any person not an *enemy or ally of enemy* claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him * * * *may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States* for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled. *If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian * * * until any final judgment* or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian * * * on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (Italics supplied.)

Lest there should be attempt to raise any doubt as to whether the relief and remedy provided by § 9(a) was intended to be exclusive of any remedy in any other forum or of any relief different from that provided by § 9(a), the following language of § 7(c) was incorporated into the Act:

> (c) * * * *[4th ¶]
> *The sole relief and remedy of any person* having any claim to any money or other property heretofore or *hereafter* conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him *shall be that provided by the* terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. (Italics, brackets and bold face supplied)

(b) The Decided Cases Sustain the Fact That No Remedy is Available Under the Tucker Act in the Court of Claims or For Just Compensation in Any Court.

The availability of a remedy in the Court of Claims was the specific subject of controversy in the case of *Escher, Admr., et al.* v. *U. S.*, 68 C. Cls. 473; cert. den. 281 U. S. 752. There the plaintiff had brought suit in the Supreme Court of the District of Columbia and being dissatisfied with the relief granted, on the ground that it was not equivalent to just compensation, sought to recover just compensation in the Court of Claims. The latter court accorded full effect to the language of §§ 9(a) and 7(c) and denied relief. At pages 478-479 the court said:

> * * * When Congress provided the place and manner of commencing a suit on behalf of a person whose property had been seized and who was not an enemy or an ally of an enemy, the effect was to exclude all other jurisdictions. "Where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U. S. 328, 331. And this principle is especially applicable where Congress has

> conferred jurisdiction upon some court for the purpose of suit against the United States for compensation. *United States* v. *Pfitsch*, 256 U. S. 547, 552.

In the case of *Pflueger* v. *United States*, 121 F. 2d 732; 73 App. D. C. 364, cert. den. 314 U. S. 617, the lower court had occasion to pass on the question of the availability of any other relief than that provided by § 9(a). There the plaintiff had received back from the Custodian the proceeds of his property which had been sold by the Custodian. He then brought suit in the District Court of the United States for the District of Columbia to recover the asserted difference between the value of the property and the amount realized for it by the Custodian. The Circuit Court, in sustaining the dismissal of the complaint by the District Court, stated (p. 736):

> This being a suit against the United States (*Cummings* v. *Societe Suisse*, 66 App. D. C. 121, 85 F. 2d 287) and appellant not having brought himself within the terms of the Government's consent to be sued, the trial court was without jurisdiction and its decision to that effect was, therefore, clearly right and is affirmed.

It is quite apparent, therefore, putting aside at this point any purported effect of amended § 5(b), that the courts have determined that the language of §§ 9(a) and 7(c) means exactly what it says.

(c) No Logical Basis is Suggested for the Implied Substitution of a Tucker Act Remedy for That of § 9(a) of the Trading with the Enemy Act.

Aside from considerations of the inequity and the injustice of depriving an eligible claimant of his property in kind, there are substantial practical reasons why Congress prescribed the relief and remedy provisions of § 9(a). The forums provided are the various United States District Courts throughout the country, and not the Court of Claims, thereby making available a remedy at the place of residence

of the claimant—and it must be remembered that many persons whose property or interests are seized reside in the United States but outside the District of Columbia.

What is of much greater importance is the simplicity of the remedy provided. The sole issues under 9(a) are (a) whether or not the plaintiff is an enemy or ally of enemy, and (b) whether the property sued for was owned by or held for the benefit of an enemy. If these issues are decided negatively in favor of the plaintiff the litigation is at an end. There remains only the simple ministerial act of returning the property to the plaintiff or, in the event that before suit is brought the Custodian has sold the same, of delivering to the plaintiff a check for the proceeds.

For this relatively simple, expeditious remedy petitioner would substitute litigation which, of necessity, involves not only the identical issues triable in the district courts, but in addition thereto would superimpose a third very complicated issue, namely, that of the value of the property at the time it was taken. This Court needs no reminder that valuation controversies involve the litigant in the throes of the most complex, controversial, drawn-out type of litigation that our judicial machinery is concerned with.

We emphasize below (p. 13) the extreme reluctance of this Court to indulge in repeal by implication. Nowhere in amended § 5(b) and nowhere in its entire legislative history will be found a syllable to the effect that a Tucker Act or any other remedy was to be substituted for that of 9(a). Thus petitioner is not only confronted with the necessity of the "stark obliteration" of the language of § 9(a), but is compelled to legislate into amended § 5(b) language which is just not there.

And all of this to what purpose? What fanciful interests of the United States are to be served by an insistence that the Custodian have the right to retain property owned by a friendly foreign national which is devoid of any enemy interest? On petitioner's hypothesis, as urged in argument in the District Court, a friendly foreign national

would have an instantaneous right, upon a seizure, to sue for the money value of his property in the Court of Claims. Thus, in the instant case, the Custodian would have on his hands a brewery and a chain of retail gasoline stations and respondent would have gotten out of the Treasury a sum of money purporting to be the value thereof at the time of taking. But, it may be asked, Suppose the Government wanted the brewery or its output or the chain of retail gasoline stations for some purpose connected with the war effort? The answer is that the Government could have acquired them immediately and expeditiously, just as it could have acquired any property whatsoever, subject to its jurisdiction, whether owned by citizen or alien, by the simple, direct exercise of its vast and virtually unlimited powers of requisition and eminent domain and without any distortion of the Trading with the Enemy Act.

It is further to be kept in mind that property in respect of which a friendly foreign national might have obtained a judgment for return from the Custodian, nevertheless would have no other control over such property than was permitted by existing freezing regulations, and could deal with such property only as was permitted under such licenses as might be issued by the Treasury.

II.

Nothing Contained in Amended § 5(b) of the Trading with the Enemy Act Was Intended to Deprive a Friendly Foreign National of the Relief and Remedy Provided by § 9(a) of Said Act.

It is to be re-emphasized that the express language of § 9(a) was in no wise amended by amended § 5(b). It seems inescapable that had it been the intention of Congress to make so fundamental a change as to foreclose the remedy of § 9(a) to a friendly foreign national it unquestionably would have inserted into § 9(a), by way of amendment, the few words necessary to accomplish that purpose and simul-

taneously would have substituted constitutionally sufficient relief and remedy. This the Congress refrained from doing (see Point VI, *infra*), resulting in the necessity of petitioner's tacit resort to the tenuous proposition that § 9(a), insofar as it provides relief and remedy to a friendly foreign national suing in respect of non-enemy property, was impliedly repealed by amended § 5(b). The aversion of the courts to such implication has been repeatedly stated. *Aldridge, et al.* v. *Williams*, 3 How. 9, 27; *Posadas* v. *National City Bank*, 296 U. S. 497, 503-505. This Court has consistently adhered to the doctrine that a statute is not to be construed as impliedly repealing a prior law unless there is an *irreconcilable conflict* or *no other reasonable construction can be applied*. It is submitted that the cases cited by the petitioner in reference to this proposition (pet. br. p. 35) affirmatively support this principle and are in no wise authority for an implied repeal of § 9(a). The observations of this Court in the recent case of *Markham* v. *Cabell*, 326 U. S. 404, 410-411, apply with equal force in the instant case:

> The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible.

Not only does petitioner's position require an implied amendment or repeal of § 9(a) (insofar as it relates to a friendly foreign national) but also of § 7(c) and of § 17 (*infra*, pp. 49-50). (The latter section expressly confers jurisdiction on the District Courts of the United States "to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process

as may be necessary and proper in the premises to enforce the provisions of this Act * * *.")

But there is a further and more readily apparent invalidity in the petitioner's position. In the District Court petitioner placed great reliance on the proposition, reiterated in substance in the circuit and in this court, that: "Since vesting of the plaintiff's property was authorized by § 5(b), the plaintiff has no right to compel its return." This *non sequitur* presents in bold relief the false premise from which flows a series of fallacious deductions respecting the interpretation of amended § 5(b). The mere fact that the Custodian is given authority to seize and vest property, under amended § 5(b), is by no amount of circumlocution tantamount to the proposition that he is *ipso facto* authorized to retain the same in the face of a suit under § 9(a). This is made clear when consideration is given to the general scheme of the whole Trading with the Enemy Act.

Under the unamended Act, the Custodian was given authority to seize or vest, without a hearing, and without any judicial proceeding, the property of anyone, even that of an American citizen, provided that he made the preliminary, although *ex parte*, determination that the property was enemy owned or held for the benefit of an enemy. Then, *provided no suit under § 9(a) was interposed*, he might sell or otherwise dispose of the property, under the powers given to him by § 12, despite the fact that his determination that the property was of enemy character later turned out to be unfounded. In case of sale prior to suit the deprived person's relief under § 9(a) is limited to the proceeds of sale.[2] It is to be emphasized that the Custodian's authorization was not to seize such property only as was in fact enemy in character (i.e. "* * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy * * *"), but was actually to seize and take

[2] By reason of § 7(c), 4th paragraph.

title to any property "which the President[3] after investigation *shall determine* is so owing, etc. * * *".

This procedure was held to be constitutionally permissible because, and only because, of the availability of the remedy provided by § 9(a). *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 81.

It is obvious therefore that the range or field of property subject to the Custodian's seizure authority under § 7(c) was much broader than that covered by his authority to retain: the two authorizations were not coextensive. Likewise the range of property vestible under amended § 5(b) does not define or measure the range of property retainable thereunder.

The scheme of the seizure and return provisions of the Act are excellently summarized in the scholarly opinion of Judge Knox in *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 F. 852, 859 (1918):

> And in the present legislation, at least so far as it affects the case at bar, there is no contravention of the Fifth Amendment of the Constitution. The very act, in section 9 thereof (Comp. St. 1918, § 3115½e), contemplates the possibility of mistaken action upon the part of the Custodian, and to the end that no loyal *citizen or friend* shall be deprived of his property without due process of law the section reads:
>
> (Here Section 9 is quoted)
>
> Under the provisions of this section the rights of a person who is not an enemy or ally of enemy are adequately protected. If the property which has come into the hands of the Custodian belongs to a citizen of the United States, or indeed *to a friendly alien*, the title of such person thereto is not finally divested. Any title which vests in the Custodian will be defeasible in its nature. Whether the defeasance, if it may be called such, shall operate, will depend upon the outcome of the proceedings to be instituted by the citizen or

[3] Under the authority of § 5(a), by reason of the delegation of authority to the Custodian, the determination was actually made by the Custodian. *Stoehr* v. *Wallace*, 255 U. S. 239, 245.

> *friendly alien*, who, in appropriate proceedings under section 9, asserts title to the property. Pending a determination of the issues arising in such proceedings, the possession at least, and perhaps a defeasible title, is in the Custodian, and as an administrative matter I do not see where else it could be, if the act is to have any salutary effect in the way of rendering enemy property unavailable for the purposes of the enemy. (Emphasis supplied.)

A somewhat more succinct analysis is embodied in the following excerpt from *Becker Steel Co. v. Cummings, supra*, 296 U. S. 74, 79:

> "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, *and such a seizure was lawful* even though the determination were erroneous. *Central Union Trust* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland, supra*, 30[[271 U. S. 298]. Instead by § 9(a) it gave to the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time, *by the all-inclusive language of § 7(c) it denied to him any other remedy.*" (Italics supplied)

A further excellent discussion of the plan of the Act, as related to seizure and return, is to be found in *Stoehr* v. *Wallace*, both in Judge Hand's opinion in the Circuit Court of Appeals, 269 F. 827, 833-835, and in the opinion of Justice Van Devanter in the Supreme Court, 255 U. S. 239, 241-246.

No doubt exists, therefore, that the Custodian's power to take was not tantamount to authority to keep. As Judge Knox pointed out, the seizure gave the Custodian something in the nature of a defeasible title. His legal relations in respect of non-enemy property which he seized were not those of a fee simple owner, despite the language

of Section 12 statitng that he "shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof." These powers of disposition and sale were his provided only that no suit was brought against him under § 9(a). This proposition is made clear in the opinion of Justice Holmes in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569. There, persons in possession of property which the Custodian sought to seize with the aid of the District Court, argued that they were entitled to a determination of the ownership of the property by the court before being required to turn it over. To this argument the court replied:

> To to the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, enlarging § 12, the Custodian "shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed," etc., to him, and is given the power to sell and manage the same as though he were absolute owner. *All this may be conceded if no claim is filed. But this act did not repeal § 9*, which is amended by the later Acts of July 11, 1919, c. 6, 41 Stat. 35, and of June 5, 1920, c. 241, 41 Stat. 977, and as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing but the preleminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more. (Emphasis supplied.)

It is submitted that there is nothing in the language of amended § 5(b) which even suggests that the "disposition

and sale'' provisions thereof were to have any more effect by way of foreclosing the relief and remedy of § 9(a) than did the language of § 12 of the unamended Act in respect of seizures made under Section 7(e). This is best illustrated by observing the parallelism between the seizure and disposition provisions of the unamended Act and the vesting and disposition provisions of amended § 5(b):

§ 7(c)—Seizure Powers of Custodian	*Amended § 5(b)—Vesting Powers of Custodian*
If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian;	* * * and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, * * *

§ 12—Powers of Custodian With Respect of Seized Property

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof *in like manner as though he were the absolute* owner thereof * * * (Italics supplied)

Amended § 5(b)—Powers of Custodian in Respect of Vested Property

* * * and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

A close comparison will reveal that the dispositive or dominion provisions of § 12 are substantially stronger and more comprehensive than the dispositive or dominion provisions of § 5(b).

It is thus apparent that petitioner's reliance upon the sale and disposition provisions of amended 5(b) as creating

an irreconciliability with, and therefore an implied repeal of the remedy afforded by 9(a) is without substance. Since petitioner's attorneys rely almost entirely upon the sale and disposition language of amended § 5(b) to support their whole position, it seems nothing short of amazing that nowhere in their brief have they even undertaken to break down or even to criticize the reconciliation between the provisions of § 9(a) and the dispositive provisions of § 12 given in *Central Union Trust* v. *Garvan, supra*, 254 U. S. 554, 569, which presents a precise analogy to the reconciliation of § 9(a) with the dispositive provisions of amended 5(b).

Nor does the fact that the Custodian may pass perfect title to a purchaser of seized property alter this conclusion. Whether we treat the Custodian as acquiring by his taking, a defeasible title or a mere possession, in either event coupled with such defeasible title or possession he acquires a power—a power to pass good title to a purchaser, provided no suit under 9(a) has been instituted prior to the sale. The time between the taking and the sale is in the nature of a statute of limitations against the claimant. At any time up to sale the Act gives the claimant the power to cut off the power and prevent the sale by bringing suit. On the other hand, if the claimant stands by and allows the sale by the Custodian to take place, his right to the return of the *res* is tolled and he is relegated, by way of relief, to the proceeds of sale. § 7(c).

The question which remains then is, What purpose was sought to be accomplished by amended 5(b)? The answer seems quite apparent. It was to provide a net of the broadest dimensions to enable the seizing or vesting authority to expeditiously gather in, initially, any parcel of property within the broad domain of foreign national ownership upon any degree of suspicion that the same might be owned by or held for the benefit of an enemy. Under the unamended Act (§ 7(c)—1st ¶), although it was not necessary to the seizability of property that it in truth and in fact belonged to or was held for the benefit of an enemy or ally of enemy,

nevertheless it was a condition precedent to a valid seizure that it be predicated upon an investigation and formal determination or finding by the Custodian that it was owned by or held for the benefit of an enemy.[4]

By reason of the necessity of making this precedent determination or finding of enemy status of the property prior to seizure, onerous and time-consuming duties of administrative investigation were imposed upon the Custodian. Furthermore—and what was an equal or more cogent consideration—the Custodian was required to assume the weighty and stern obligation of making a responsible administrative determination or finding, which, if in the affirmative, could cast upon the property or business enterprise seized, the stigma of enemy ownership with all of the attendant dislocation and virtual "excommunication" which such determination would carry in its wake.

It was undoubtedly with these considerations uppermost in mind that Congress, in amending 5(b), made its language broad enough to permit the Custodian to vest the property of any foreign national at any time he entertained even a suspicion that the property involved was owned or held for the benefit of an enemy, with the consequent shifting to the claimant of the onus of establishing the non-enemy character of such property by forcing him to bring suit under § 9(a) of the Act. Thus Congress eliminated the onerous and time-consuming duties of extensive administrative investigation and relieved the Custodian of the burden of responsible decision which heretofore was imposed upon him, with all of the attendant possibilities of the escape of property in which enemy interests might exist or in which any enemy interests might be so concealed as to avoid ready detection by the Custodian's investigative force.

These considerations are blithely brushed aside by the petitioner in its present brief (pp. 46, 47). Its discussion

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[4] Property "which the President after investigation shall determine is so owing or so belongs or is so held." (7(c)).

Despite the requirement for this precedent investigation and determination there were, of course, many cases where the seized property turned out to be in fact not of enemy character.

effectually reads out of consideration that clause in § 7(c) reading, "which the President after investigation shall determine is so owing or so belongs or is so held." But this is not the position heretofore taken by petitioner in its brief in the District Court (pp. 10-11). The following were there stated as the underlying purposes of amended 5(b):

> There were strong reasons why a vesting power limited to property which *could be proved* to belong to enemies would have been ill-adapted to the conditions of this war. In recent years Germany (and to a lesser extent, the other Axis countries as well) had developed techniques for extending economic operations into foreign countries through "fronts" or "cloaks."[5] The multiple possibilities of corporate ownership were especially relied upon by Germany to conceal beneficial interests in assets in the United States. See United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), 29-31. Congress, aware of such cloaking, granted a power adequate to cope with it. By authorizing the vesting of all foreign property, it eliminated the jeopardy to the national interest which time-consuming search for enemy ownership would entail. (Bracketed footnote and italics supplied by respondent)

Thus interpreted, there is given to amended 5(b) pregnant, logical meaning and any question of constitutional infirmity is reduced to a refinement.[6] To adopt the lan-

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[5] (This footnote is respondent's and not petitioner's). Under § 7(c), 1st ¶, property "owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy" was specifically seizable by the Custodian. A "cloak" is nothing other than a person holding property for, by, on account of, or behalf of, or for the benefit of, an enemy or ally of enemy. A "cloak" very obviously would not be able to obtain the return under § 9(a) of property so held.

[6] It has been intimated that the preliminary determination of enemy character despite its *ex parte* nature, may constitute an element of procedural due process. *Stoehr* v. *Wallace*, *supra*, 255 U. S. 239, 245-246.

guage of the Supreme Court in *Becker Steel Co.* v. *Cummings, supra,* 296 U. S. 74, 81, in dealing with a not dissimilar statutory-construction problem in reference to § 7 of the Act, it may be tersely stated:

> Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court, to give to citizens and *alien friends* an adequate remedy for invasions of their property rights in the exercise of the war powers of the Government. *Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies.* (Emphasis supplied.)

From the discussion under this point it seems quite apparent that by amended § 5(b), in conferring upon the Custodian the power to vest, the Congress did not *ipso facto* intend to give such an indefeasible, unconditional title over seized property as to preclude to a friendly foreign national the relief and remedy provided by § 9(a); nor by spelling out the Custodian's powers over vested property did it intend to do more than § 12 of the Act accomplished in respect to seizures made under § 7(c).

Petitioner, however, seeks to derive comfort from certain excerpts out of the legislative history which preceded the enactment of amended § 5(b) on December 18, 1941. This legislative history is quite amorphous and confused. However, it is submitted that a careful review of the fragments which make up that history will leave small doubt that the Congress was concerned in precluding the escape of enemy property, and, more particularly, that there never was a Congressional intent to wipe out the relief and remedy provided by § 9(a):

When Title III of the First War Powers Act was first presented by the departments to Congress it embodied a

Title III which would merely have re-enacted the Trading with the Enemy Act in its then form.

The Government representatives who appeared before the Judiciary Committee were two lawyers from the Treasury Department. After the Judiciary Committee and these gentlemen had gone over Title III as proposed in H. R. 6206, the Committee directed that they spell out their proposed legislation in lieu of the blanket reenactment of the Trading with the Enemy Act by reference. To this suggestion Mr. Cox, of the Treasury, made the following reply:

> Suppose I get in touch with the Legislative Counsel of the House and see if we cannot put in in its complete text the Overman Act, and the Trading with the Enemy Act and all of the amendments which seem to me to be essential to the issue here, leaving the substance of 301 integrated with the full text? (Unpublished Hearings Before House Committee on the Judiciary on H. R. 6206, Dec. 12, 1941.)

After the re-drafting of Title III was accomplished it was incorporated into H. R. 6233 (77th Cong., 1st Sess.) and re-introduced on December 15, 1941 with H. R. Rep. No.

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[1] H. R. 6206, 77th Cong., 1st Sess., introduced on December 11, 1941, incorporated as "Title III—Trading with the Enemy Act" the following:

Sec. 301. All of the provisions of the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411), together with all of the amendments to such Act, which have for any reason ceased to be in effect, are hereby reenacted: *Provided, however,* That no such provision or part thereof shall become operative until such time or times as the President shall find and by Executive order declare that it would be advantageous in the prosecution of the war for such provision or part thereof to become operative. The President is authorized to issue regulations to carry out any provision or part thereof of the Trading with the Enemy Act or any amendment thereto which becomes operative pursuant to this section; and he may exercise any power or authority conferred upon him or any other officer or agency by such Act and amendments thereto through any officer or agency that he may designate or otherwise. The definitions or terms appearing in any provision of the Trading with the Enemy Act or amendments thereto, shall not be construed as a limitation of the power which is hereby conferred upon the President to prescribe from time to time definitions or interpretations consistent with the purposes of this section and the present state of war.

1507. On December 16 the bill was discussed on the floor of the House and passed on that day. Also on December 16 a companion bill, S. 2129 (S. Rep. No. 911) was discussed on the floor of the Senate and on December 17, H. R. 6233 was substituted for S. 2129 and passed on that day. This bill, embodying the present amended § 5(b) as Title III, was approved by the President on December 18.

It is apparent from discussion on the floor of the House that the new legislation was a slight, if any, deviation from the powers given to President Wilson during the first World War, and that the underlying thinking was that the Congress was concerned in respect of the vesting provisions of amended 5(b), with enemy property. The following passages are illustrative (87 Cong. Rec., Pt. 9):

Representative Fish (p. 9856): "* * * This bill merely gives the President the same powers that were given to Woodrow Wilson in the last war * * *

"Title III deals with the Trading with the Enemy Act, the old Trading with the Enemy Act, with certain additional powers giving the President control over communications with foreign nations, also giving the President the power *to use property of the enemy that we may confiscate.* In the last war the President could confiscate every [obviously '*enemy*'] property but we were not able to use it to our own advantage. This bill gives him that additional power. * * * (Italics and brackets supplied)

* * * * * * * * * *

Representative Sumners, Chairman of the Judiciary Committee (p. 9858):

"* * * This bill attempts to bring into one legislative enactment what is regarded to be those provisions of the Overman Act and Trading with the Enemy Act which it is required to legislate relative to now. * * *"

* * * * * * * * * *

Mr. Jenkins (p. 9859):

"The gentleman may have covered the point I am about to ask him for; I was not here when he started.

Has the gentleman covered the main differences between this bill and the powers granted to President Wilson in the first World War?"

. . . . . .

Mr. Sumners:

"I made the general statement that I believed for all practical purposes we may say there is no substantial difference. Some modifications have been made that were deemed necessary. Guided by experience certain modifications have been made, but I believe I can state generally and that the members of the Committee will generally agree, that there is no *substantial* difference between the provisions of this bill and the similar grants of power in the Overman Act and the Trading with the Enemy Act." (Italics supplied)

. . . . . .

Mr. Jenkins:

"I have the most profound respect for the gentleman and his committee but have wondered whether there was any controversy at all over this bill. The reason I am asking these questions is so that if I am asked about the bill I will know something about it, and want to say that the great Judiciary Committee of the House considered it and unanimously agreed on its report."

. . . . . .

Mr. Sumners:

"The Committee on the Judiciary did examine the bill. We recognize that it was a technical matter and pretty difficult for us to know all the details. The committee was largely persuaded by the discovered facts, the recognized facts, that there is no substantial difference *insofar as the committee could discover* between the powers we propose to grant to this President *and the powers which President Wilson had.* That is about as much as I can say." (Italics supplied)

. . . . . .

Representative Springer (p. 9865):

"The other provision of the bill, and I refer to title III, with respect to 'trading with the enemy', has prac-

tically the identical provisions, as I understand it, that the bill contained which was in force during the last World War. * * *"

Taking the foregoing excerpts from the discussion on the floor, together with those quoted in the petitioner's brief, we find not a scintilla of reference to any proposal to repeal § 9(a), § 7(c), § 12, or § 17 of the then existing Trading with the Enemy Act.

When the bill came before the Senate, the underlying purpose of reviving the old legislation was the dominant idea. When the bill was reported out, Senator Barkley referred to it as a bill "which reenacts and revives the provisions * * * of the Trading with the Enemy Act" (87 Cong. Rec., Pt. 9, pp. 9789 and 9837).

Senator Van Nuys, Chairman of the Judiciary Committee of the Senate, made this response to a query in respect of the provisions of the bill (p. 9838):

> "In a nutshell, the bill grants to the President of the United States *the same war powers* that were exercised by President Wilson during the last World War—and exercised by him with a great degree of success." (Italics supplied)

It is the fact that he also stated:

> "* * * when it comes to the Trading with the Enemy Act, in the provisions for seizure and freezing of alien property, it goes further, and not only freezes it, but seizes the property; *possession* of it vests in the United States, and the property is to be liquidated and disposed of under the rules and regulations of the Department. To that extent it exceeds the powers granted President Wilson." (Italics supplied)

However, when we come to the language of the Senate committee report, which, it is submitted, is the most authoritative statement of purpose upon which all members of either House are entitled to rely, we find the following statement as the concluding part of the report in respect of Title III (S. Rep. 911—77th Cong. 1st Sess., p. 2):

"This provision of the bill to a considerable extent follows the pattern of existing law and is a logical extension of the present foreign property control system, which has been operating very satisfactorily for almost 2 years. The extension could be put into immediate operation with a minimum amount of trouble or dislocation of legitimate activities.

"It is essential that the Government have this power, a power exercised by every other wartime government *and exercised by this Government during the last war.*"

Thus, on a review of the legislative history of the bill in the Senate we again nowhere find a single reference to § 9(a) or § 7(c) or to any proposal to repeal those provisions of the Trading with the Enemy Act which it was the dominant purpose of the First War Powers Act to give effect to.

Having in mind that the complete consideration of amended § 5(b) in both Houses was on only parts of two days (December 16 and 17) and the utterly indecisive and conflicting statements which make up its legislative history, it is quite audacious on the part of petitioner to place the weight it does on fragments of that history as support for its interpretation of the section.

III.

Denial of the Relief and Remedy Provided by Section 9(a) Would Conflict with the Fifth Amendment to the Constitution.

In construing the Act, prior to the enactment of amended § 5(b), the courts have repeatedly held that the relief and remedy provided in § 9(a) (which were determined to be constitutionally adequate) were necessary as to one not an enemy or ally of enemy in order to save the constitutionality of the seizure provisions. *Stoehr* v. *Wallace*, 269 F. 827, affirmed 255 U. S. 239; *Becker Steel Co. of America* v. *Cummings, et al.*, 296 U. S. 74, 81.

Therefore, if the remedy under 9(a) is no longer available, then unless the Trading with the Enemy Act, includ-

ing amended § 5(b) admits of a remedy in the Court of Claims for just compensation, the vesting provisions of amended § 5(b) are in conflict with the Fifth Amendment.

It is conceded by respondent that with respect to *enemy property* the United States may deal in any manner it chooses even to the extent of outright confiscation. *Miller* v. *United States*, 11 Wall. 268, 306 (1870); *United States* v. *Chemical Foundation*, 272 U. S. 1, 11 (1926). The converse, however, is true with respect to property which is of non-enemy character. Such property, within the United States, is entitled to all of the safeguards of the Fifth Amendment even though owned by, or held for the benefit of, a foreign national. In this respect the citizen-owner and the alien-friend-owner stand on exactly the same footing. This firmly entrenched principle of constitutional law is clearly and unequivocally enunciated in the land-mark case, *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489:

> The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution.

This constitutional proposition appears to have been accepted, although somewhat grudgingly, by the petitioner in the lower court. It is the acceptance of this doctrine which compels resort on the part of the petitioner to the strained construction of amended § 5(b) to permit of a remedy to respondent in the Court of Claims for just compensation. It is felt that it has been amply demonstrated in Point I above that any attempted interpretation of the Trading with the Enemy Act to allow a remedy for just compensation is untenable.

IV.

Denial of the Relief and Remedy of § 9(a) Would Conflict with the Treaty Between the United States and Switzerland.

To compel this respondent to resort to a just compensation suit in the Court of Claims, upon any strained interpretation of amended § 5(b), would require negation of Article I of the Treaty of Friendship, Commerce and Extradition between the United States and Switzerland (11 Stat. 587) Senate Document No. 357, 61st Congress, 2d Session, page 1764. (*Infra*, p. 50)

Nowhere, nor at any time, has it even been suggested by petitioner that the relief and remedy of § 9(a) of the Act is no longer available to an American citizen. Nor has it been suggested that an American citizen whose property may have been vested by the Custodian, pursuant to amended § 5(b), has a just compensation remedy in the Court of Claims. See *Escher, Admr. et al.* v. *U. S.*, 68 C. Cls. 473. Under petitioner's interpretation of the Act, including amended § 5(b), we find the American citizen claimant in full possession of the right to the relief and remedy of § 9(a) and a simultaneous denial of that relief and remedy to the citizen of Switzerland. The pertinent portion of the Treaty reads as follows:

> Article I. The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland * * * shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice *in the same manner as native citizens*, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. *No pecuniary or other more burdensome condition* shall be

imposed upon their residence or establishment, or *upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.*

The foregoing privileges, however, shall not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors. (Italics supplied)

Under petitioner's "escape" interpretation of amended § 5(b), the only remedy suggested as available to a friendly Swiss national would be a suppositious suit in the Court of Claims for just compensation. Just compensation means the value at the time of taking.[a] It is apparent that if the value of the property vested by the Custodian substantially increased after the vesting by the Custodian, a friendly Swiss national would not only be deprived of his actual property but also of this increment in value and would be compelled to accept the value at the time of the taking.

Under § 9(a) of the Act the American citizen, whose property may have been vested, by bringing suit against the Custodian prior to a sale, may recover the vested property itself and thereby have the advantage of the incremental value. Thus a discrimination which may often be a very substantial one is effected in the treatment of the American citizen on the one hand, and the friendly Swiss national on the other. It is submitted that this is a striking example of the very character of discrimination which the Treaty was intended to prohibit.

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[a] "The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. (cases) Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. (cases) And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking." (cases). *Russian Volunteer Fleet* v. *United States*, *supra*, 282 U. S. 481, 489.

Petitioner's attorneys seek to avoid the conflict between the Treaty and their interpretation of amended § 5(b) by the half-device of the argument that Article I of the Treaty is inapplicable to corporations (Pet. br. pp. 64-65). They refer, in support of this inapplicability, to a letter dated January 3, 1934 from Acting Secretary of State Phillips to the Swiss Minister. They there point out that the construction of a Treaty by the Department of State is entitled to considerable weight with which respondent agrees. It is nevertheless noteworthy that the Swiss Government did not accede to Mr. Phillips' interpretation of the Treaty. The Swiss Minister's reply to Mr. Phillips' letter (MS, Department of State, File 811.5034/170), quoted in III Hackworth, *Digest of International Law*, 432-3, is set out in the appendix, (*infra*, pp. 50-51) and contains a very interesting analysis of the contents of Mr. Phillips' letter.

But the question whether or not Article I of the Treaty covers corporations is substantially beside the point when dealing with the broad question of the construction of amended § 5(b). Conceding *arguendo* that Article I of the Treaty is not applicable to corporations, can there be any doubt that as to natural persons there is a head-on conflict between the Treaty and petitioner's interpretation of amended § 5(b)? Unable to answer this query, petitioner's attorneys are forced to the statement (pet. br. p. 66), "If there were conflict between § 5(b) and a Treaty provision, § 5(b), being later would prevail."

Then *in extremis* petitioner's brief says (p. 67):

> "But we submit that there is no possible conflict with any of the provisions of the treaty. Plainly the denial of the substantive right to recover vested property is not a denial of access to the courts within the meaning of Article I; Swiss nationals may have their day in court, both in the district court in proceedings under § 9(a), and in the Court of Claims or the district court under the Tucker Act."

Petitioner's whole position is that respondent is in the wrong court and that under no conceivable circumstances

can petitioner have the relief provided by § 9(a). Its Motion to Dismiss before this Court is "because the complaint fails to state a claim upon which relief can be granted inasmuch as it appears on the face of the complaint that plaintiff is a national of a foreign country * * *". Just what is meant by "their day in court * * * under § 9(a)" is beyond the range of the mental spectrum of respondent's counsel. Enlightenment on this score must, therefore, come from petitioner.

The courts cannot be expected to be other than extremely reluctant to permit any tenuous interpretation of a statute to effect a repeal of the provisions of the Treaty[*] with the consequent international complications arising therefrom.

V.

The Actual Administrative Interpretation by the Custodian of §§ 9(a) and Amended 5(b) Accorded with the Interpretation Herein Contended For.

The actual practice and philosophy of the Custodian in Administering the Act, irrespective of the seeming breadth of the vesting scope of amended 5(b), indicates clearly that he interpreted the intent of Congress in the same manner as herein contended for. The Custodian's obvious recognition of the tenuous constitutionality of the position taken in the current brief in his behalf is well illustrated by a summary reference to some of the highlights of his actual practice under the Act and the efforts made to avoid the constant threat of constitutional infirmity in any attempted exercise of the "plenary" authority contended to be his under the pertinent portions of Section 5(b).

Some months after 5(b) was amended (December 18, 1941), Executive Order 9095 (*infra*, pp. 52-53) was promulgated pursuant thereto, on March 11, 1942. This was the Order which set up the Office of Alien Property Custodian and purported to give the Custodian the very

[*] Cf. *Johnson* v. *Gearlds*, 234 U. S. 423, 439.

broad authority to vest the property of "any foreign country or a national thereof" whenever he should so direct. The early vesting orders were issued pursuant to this executive order and were usually short documents merely making the determination that the seized property was owned by a foreign national, and ending with a paragraph reciting that "any person not a national of a foreign country designated in Executive Order 8389" might file a claim with the Custodian for the return of his property. Several of the vesting orders in the instant case, in their initial form, were issued under authority of this executive order.

Despite the ostensible basis for the vestings made under Executive Order 9095, namely ownership by a "foreign national", actually the basis for vesting was an assumption [10] that the property involved was in some wise enemy-owned. As a matter of fact, the Custodian never vested any property other than on a suspicion of enemy ownership,[11] even under the broad language of E. O. 9095.

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[10] "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable." *Stoehr* v. *Wallace*, *supra*, 255 U. S. 239, 245.

[11] Little or no light is shed on the rationale underlying the relevant portions of amended 5(b) by the legislative history of Title III of the First War Powers Act, 1941. However, real light is shed on the purposes and objectives of amended 5(b) in the hearings on H. R. 4840, 78th Congress, 2d Session, "A Bill to Amend the First War Powers Act, 1941". The latter Bill (which finally died in Committee) had among its purposes that of obviating the serious constitutional infirmities of amended 5(b) as that section is sought to be interpreted by defendant's present attorneys.

In the course of the hearings, a telegram of protest was sent to the Committee, raising constitutional and international policy objections to the proposed Bill. To this telegram the Assistant General Counsel of the Alien Property Custodian's Law Bureau, who had been carrying the laboring oar before the Committee, was invited to, and did, reply on June 22, 1944:

> In closing, it may be of interest to the Committee to know that the Custodian has not vested, and has no present intention of vesting, the property of foreign nationals *other than those in enemy or enemy-occupied territory* and cloaks. No un-

It is quite significant that after the Custodian had operated under E. O. 9095 for the short period of less than four months, E. O. 9193 (*infra*, pp. 53-57) was promulgated on July 6, 1942, as an amended form of E. O. 9095. This later executive order, particularly Paragraph 2 thereof, was couched in language much more restrictive of the Custodian's authority to vest, than the language of E. O. 9095. Following July 6, 1942 the Custodian's vesting orders were predicated on ownership or interest of "a national of a designated enemy country",[12] and ended with a paragraph reciting that "any person not a national of a designated enemy country" could file a claim for the return of his property.

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necessary dislocation of the rights of friendly aliens is contemplated. However, Congress in the First War Powers Act, 1941, conferred the power to vest the property of all foreign nationals. In order to reinforce the constitutionality of that Act, and to provide clearcut remedies in any case where it is necessary to exercise the vesting power to its full statutory extent, the provisions of Section 32** have been suggested. (Italics supplied.) (Hearings Before the Subcommittee on Judiciary, House of Representatives, 78th Cong., 2nd Sess. on H. R. 4840, p. 129)

* It is to be remembered, with reference to the italicized portions of the above statement of Mr. Cutler, that foreign nationals residing in either enemy or enemy-occupied territory are enemies within the meaning of Section 2 of the Trading with the Enemy Act.

** Section 32 of the proposed Bill was framed to give the friendly foreign national a cause of action in the Court of Claims.

See also the 1943-1944 report of the Custodian to Congress, House Doc. No. 184, 79th Cong. 1st Sess., particularly the letter of transmittal to the President appearing at pp. III-IV and "Objectives", p. 4, where it is made clear that the Custodian's practice was to vest property only of enemies or cloaks.

[12] As a matter of fact, in the instant case Vesting Order No. 51 was issued on July 10, 1942 and an amendment to Vesting Order No. 14 was issued on July 11, 1944. Both of these orders recited that "Any person except a national of a designated enemy country" might file a notice of claim with the Custodian for the return of the vested property.

Thus, even with respect to his authority to vest under the broad language of E. O. 9095—which is constantly to be contrasted with any authority to retain—the Custodian avoided taking over any property other than on an implied determination that the seized property was fraught with enemy interest. In this connection, it is not to be overlooked that the earlier broad Executive Order 9095, in conferring authority to vest the property of a foreign national contained the qualifying words (paragraph 3), "whenever the Alien Property Custodian shall so direct". The presence of this language, coupled with the delegation to the Custodian by E. O. 9095 of the authority given to the President by amended 5(b) to vest the property of a foreign national "when, as and upon the terms, directed by the President", makes it logical to take the position that the Custodian's uniform administrative practice was tantamount to a regulation promulgated by him that no property, other than that involving enemy interests, should be vested.

But, in addition to what has been said as to the Custodian's interpretation of his authority to vest, it is to be more heavily emphasized that in actual administrative practice he interpreted amended 5(b) and the Executive Orders issued pursuant thereto as giving him very doubtful, if any, authority to retain the non-enemy property of a friendly foreign national. After the promulgation of E. O. 9193, the Custodian made return of property which had been vested between March 11, 1942 (the date of E. O. 9095) and July 6, 1942 (the date of E. O. 9193), i.e., property which was seized under the broad language of the earlier executive order as property of a "foreign national." The Custodian made such return on the basis of a showing that the owner was not "an enemy or ally of enemy country" or "national of a designated enemy country". The reasons prompting this administrative policy, including several references to the constitutional problems inherent in a contrary policy, are illuminatingly set out in the opinion accompanying the divesting order "In the Matter

of Leopold H. P. Klotz, et al", Dockets Nos. 9 and 10, Claims Nos. 553 and 554. A copy of the pertinent portions is set out at pp. 37-41 below. It is urgently insisted that this practice of the Custodian in returning non-enemy property to friendly foreign nationals completely complied with the intent of § 9(a).

Petitioner's present attorneys seek to negative the effect of the Custodian's administrative practice by suggesting that he entertained doubt as to his authority to make such returns as were made in the Klotz case (pet. br. p. 33). They also seek to demonstrate that the passage of Public Law 322, 79th Cong. 2d Sess., March 8, 1946, which added § 32 to the Trading with the Enemy Act and which had for its chief purpose that of empowering the Custodian to make administrative return of property to enemy aliens, establishes a doubt that § 9(a) was understood by Congress to permit judicial returns of property under § 9(a) (pet. br. pp. 52-54).

The reply to these contentions is embodied in the Annual Report, Office of Alien Property Custodian, Fiscal Year Ending June 1945, pp. 161-162, set out in the Appendix hereto (*infra*, pp. 63-65). The fact that the Custodian was given *administrative* authority under public Law 322 to return property to enemies, and in certain instances to non-enemies, seems hardly a logical basis for the denial to the courts of *judicial* authority to return property to friendly foreign non-enemies.

VI.

Congress, During Its Last Session, Expressly Repudiated Petitioner's Attempted Construction of Amended 5(b) and Expressly Reaffirmed the Construction of § 9(a) Contained Herein.

Upon consideration of the foregoing points, without more, it is respectfully submitted that no doubt can reasonably be entertained that amended 5(b) did not and was not intended to cut off the right of a friendly foreign na-

tional to the relief and remedy prescribed by 9(a). But if a scintilla of doubt could possibly linger, such doubt is completely and unequivocally dissipated by the explicit action of Congress it self in its last session (79th Cong., 2d Sess.) in enacting the most recent amendment to the Trading with the Enemy Act (P. L. 671—79th Cong.; Chapter 878, 2d Sess.) 60 Stat 925; Title 50 Appendix U. S. C. §§ 33-38.

In the latter part of 1945 Representative Sumners, Chairman of the House Judiciary Committee, introduced, at the behest of the Government, H. R. 5089 to amend the Trading with the Enemy Act. This bill would have added a Section 33 to the Act reading as follows:

> Sec. 33. (a) A foreign country or national thereof within the meaning of section 5(b) hereof may not institute, prosecute, or further maintain a suit pursuant to section 9(a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof.
>
> (b) Notwithstanding the provisions of section 7(c) hereof, suit may be instituted by any person not an enemy or ally of enemy against the United States in the Court of Claims for just compensation in respect of any property or interest taken from the plaintiff and vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), but the complaint in such suit shall be dismised on the merits unless the plaintiff establishes that he is a person entitled to just compensation by virtue of the last clause of the fifth amendment to the Constitution of the United States.

At the hearings held on H. R. 5089 there was introduced into the record a letter dated February 4, 1946, from Mr. Byrnes, Secretary of State, addressed to the Chairman of the House Committee on the Judiciary, embodying Mr. Byrnes' invited comment on the Bill. While Mr. Byrnes' most cogent objection was to the last clause of sub-para-

graph (b) of Section 33, his more general comments in respect of the necessity of equality of treatment of foreign-owned property in the United States to that accorded American-citizen-property is enlightening.[13]

[13] Mr. Byrnes' letter is set out in full at pp. 28-29 of "Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 2d Sess. on H. R. 5089". The following is excerpted therefrom:

The position of the Government of the United States has consistently been that American property and other interests abroad are entitled to fair and equal treatment as compared with locally owned property. The possibility that diplomatic representations might cure a discrimination has not been thought a reason for failing to object to legislation discriminating against American interests. Moreover, the United States has always insisted upon the principle of adequate compensation if American property interests abroad were affected. Nor would the possibility of a ruling, at some date in the future, interpreting the fifth amendment in a manner contrary to that taken by the Department of Justice, cure the dangers of the clause cited.

The embarrassment to this United States policy stated which is inherent in the underlined language is apparent. Should nationalization of a given type of property be accomplished in a foreign country, the Department would not—if section 33 (b) as now drafted becomes law—be able to insist that the legislation implementing such nationalization provide either equal treatment for American interests or adequate compensation for interests which were taken. The importance of this question cannot, especially at present, be minimized.

Traditionally, the United States has encouraged foreign investment in the United States, and has regarded favorably American investment in friendly foreign countries, subject only to overriding considerations of national security. The United States is now committed, as approval of the United Nations Organization and the Bretton Woods institutions indicates, to a policy of expanding world trade. The United States has foreign investments greatly in excess of the investments of friendly foreign nationals here. The Department of State is even now attempting to secure complete equality of treatment for American property interests in areas in which the war was fought with respect to local legislation on war damage compensation. Under these circumstances, a deliberate legislative enactment of the United States which discriminates against friendly foreign nationals and denies to them even just compensation for seizures of their property by an agency of the United States (unless compelled by the Constitution) seems a short-sighted departure from principles which this Government has long

As a result of Mr. Byrnes' and others' objections, H. R. 5089, revised as H. R. 6890, was introduced in its later form by Representative Sumners. The later form, however, retained proposed Section 33(a) substantially as contained in H. R. 5089. (Proposed Section 33(b) elaborated the procedure for the just compensation action in the Court of Claims).

Coincident with the introduction of H. R. 6890 in the House, an identical bill, S. 2378, was introduced in the Senate. At the Senate hearings which were held in July a number of persons appeared and gave their views in opposition to proposed Section 33 ("Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 79th Cong., 2d Sess. on S. 2378"). Representatives of the Government sought to meet these arguments by contentions that the effect of the amendment to §5(b) made by the First War Powers Act, 1941, was to change 9(a) so as to deny to friendly foreign nationals the rights which they had previously enjoyed (Hearings, pp. 97-98).

In support of this contention, the decision of the Circuit Court of Appeals, Second Circuit, in *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, cert. granted, February 17, 1947, No. 346, this term, was cited and a copy thereof was introduced into the record (Hearings, p. 99). In its report on S. 2378 the Senate Committee on the Judiciary (S. Rep. 1839, 79th Cong., 2d Sess.) struck out proposed Section 33 in its entirety. In so doing they eliminated the provisions by which it was attempted to deny to a friendly

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advocated. The damage to American interests which might result cannot be adequately estimated.

The position of the United States in insisting upon equal treatment and just and adequate compensation for interest of American nationals abroad has been based upon the assertion, well-founded until now, that the United States accorded such treatment to the property and interests here of friendly foreign nationals. Should this position be destroyed, by enactment of the cited provision, the ability of the United States to prevent like discrimination against American foreign interests will be seriously jeopardized if not destroyed.

foreign national the relief and remedy provided under § 9(a) of the Trading with the Enemy Act and also the provision that notwithstanding § 7(c) of that Act, just compensation could be obtained through a suit in the United States Court of Claims.

The explanation embodied in its report (*supra* p. 2) leaves no modicum of doubt as to its intent in striking proposed Section 33:

> The first amendment by the Committee strikes out line 11 on page 1 and down to and including line 16 on page 8 [the portion of the Bill which was proposed Section 33]. The purpose of this amendment is to eliminate the proposal to cut off the right of a friendly foreign national to *sue for and obtain the return of his property under Section 9(a)*. The Bill as thus amended *preserves in full these rights under 9(a) which the friendly foreign national*, together with the United States citizen, has had for more than 25 years under the act. (Brackets and italics supplied)

Nor does it seem that there can be any doubt whatsoever that the Senate action was tantamount to an express repudiation of the dictum[14] of Judge Hand in respect of a remedy in the Court of Claims (*Silesian-American Corp.* v. *Markham, supra*, 156 F. 2d 793, 796-797) in view of the actual introduction of the Silesian opinion into the hearing record and the Government's attempted reliance thereon.

On July 25, 1946 Mr. McCormack, Majority leader of the House, in outlining the program of the House for the following day, stated (92 Cong. Rec. 10107):

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[14] Judge Hand's disregard of § 9(a) as an available remedy to the pledgee seems to be predicated upon the assumption that both parties conceded that no remedy was available under § 9(a) (p. 797), Debtor's counsel denies any such concession (Pet. br. in No. 346, this term, in this Court, p. 6).

If the circumstances of the seizure in that case were such as to require a remedy in the pledgee in order to validate, as to the debtor, the exculpatory provisions of amended § 5(b), that remedy was available in § 9(a). Cf. *Garvan, Custodian* v. *Certain Shares of International Agricultural Corporation*, 276 F. 206. Aff'd (CCA 1922), 283 F. 746.

> There is also a bill amending the War Powers Act, I think first one, which relates to the Alien Property Custodian's office. Unanimous consent for its consideration will be asked. I understand there is some objection to Section 33 of an organic act which is the first section of that bill, but that section has been stricken out by the Senate Committee and I understand the request will be to pass what would be the Senate bill as amended eliminating the objectionable features of the bill as reported out of the House Committee.

On the following day, July 26, 1946, Mr. Celler, Chairman of the Subcommittee of the House which conducted the hearings on H. R. 6890 and its predecessor bill H. R. 5089, moved to pass H. R. 6890, but with amendments (92 Cong. Rec. pt. 8, p. 10215). H. R. 6890, as amended in accordance with the proposal of Mr. Celler, struck out what was Section 33 of the Bill as first reported by the House Judiciary Committee and advanced the section numbers of the remaining sections. Mr. Celler, in the course of his management of the Bill on the floor of the House, in answer to the following query of a colleague, made the following response (92 Cong. Rec., pt. 8, p. 10218):

> Congressman Philbin: "If Section 33 is eliminated from this bill then the law as then written would give to foreign friendly nationals the right to be sued and to sue in our courts and have their rights adjudicated?"
>
> Congressman Celler: "I may say to the gentleman that the elimination of Section 33 gives the right to a *foreign national to sue for the return of his property* either in law or in equity. That does not apply to an enemy alien, only to a friendly foreign national. That right remains unchanged if we eliminate Section 33." (Italics supplied)

H. R. 6890, with the proposed Section 33 stricken out, was passed on July 29. On August 8, 1946, the President approved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia should be affirmed and the case permitted to go to trial on its merits.

Respectfully submitted,

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APPENDIX

STATUTES, TREATY, OPINION AND ORDERS.

Statutes.

THE TRADING WITH THE ENEMY ACT

Section 2 (40 Stat. 411), 50 U. S. C. Appendix, Section 2:

The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States, and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The word "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require may, by proclamation, include within the term "ally of enemy." . . .

* * * * *

Section 5(b), as amended by Title III of the First War Powers Act of 1941 (55 Stat. 839), 50 U. S. C. Appendix, Section 5(b):

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or

property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision. . . .

. . . . . .

Section 7(c) (40 Stat. 1020), as amended, 50 U. S. C. Appendix, Section 7(c):

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

. . . . . .

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

Section 9(a) (41 Stat. 977), as amended, 50 U. S. C. Appendix, Section 9(a):

Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from any enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place

of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Section 12 (40 Stat. 460), as amended, 50 U. S. C. Appendix, Section 12:

* * * The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *.

Section 17 (40 Stat. 425), 50 U. S. C. Appendix, Section 17:

The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of

appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

Treaty of Friendship, Commerce and Extradition Between the United States and Switzerland.

(11 Stat. 587), Senate Document No. 357, 61st Congress, 2d Session, p. 1764 (Malloy Treaties, Conventions, Vol. II, page 1764)

ART. I

The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland * * * shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

The foregoing privileges, however, shall not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors.

Letter from the Swiss Minister (Peter) to the Acting Secretary of State (Phillips), January 8, 1935, M. S. Department of State, File 811.5034/170, as Quoted in III Hackworth, Digest of International Law, 432-3.

Your answer of January 3, 1934, is indeed apt to give to the Convention a considerably different and much more limited comprehension than the one my Government and

the Courts in Switzerland have given it up to now. To start with, my Government holds that the question of whether or not corporations are mentioned in the treaty of 1850 is not decisive. It is clear that the only reason for their omission must have been the fact that corporations did not yet play any important part in the economic life of the time. But there was certainly no intention of depriving citizens of both parties of their treaty rights in such cases where they do not act personally but through the means of a corporation. It is to be admitted that the treaty contains various provisions which by the circumstances they involve apply only to physical persons; but there are, besides, other provisions concerning in the first place property rights where the entitled parties may be physical persons as well as corporations. The language of the treaty, in consequence, does not appear opposed to its application to corporations, insofar as their legal capacity allows it. It may be added, as a matter of course, that my Government does not want to contend that the corporations have in every case, on basis of the treaty, a right to receive the same treatment as physical persons. The application of the treaty to the corporations can only take place by analogy, mainly in the sense that the basic principle of the equal treatment provided for in the treaty applies to them as well, with the understanding that the corporations of one of the parties under equal conditions are not to be treated more unfavorably on the territory of the other party than its own corporatons. This principle would, for example, allow one of the States of the Union to grant to a Swiss corporation only such status as it accords to a corporation whose principal seat is located in some other State of the Union.

It seems to my Government, therefore, that if the above interpretation goes further than the strict language of the treaty, it has on the other hand the advantage to take the spirit of the treaty into better account.

Executive Order No. 9095.

(7 Fed. Reg. 1971)

Establishing the Office of Alien Property Custodian and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution, by the Trading with the Enemy Act of October 6, 1917, as amended, by the First War Powers Act, 1941, and as President of the United States, it is hereby ordered as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Order.

2. All power and authority conferred on the President by Sections 5 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by Sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941, except such powers and authority as were delegated to the Secretary of the Treasury by Executive Orders issued prior to February 12, 1942, and to the Board of Governors of the Federal Reserve System by Executive Order No. 8843 of August 9, 1941 (which powers and authority shall continue to be vested in and exercised by the Secretary of the Treasury and the Board of Governors respectively), are hereby delegated to and vested in the Alien Property Custodian. The memorandum of February 12, 1942, delegating to the Secretary of the Treasury certain powers and authority under said sections, is hereby revoked and canceled. Any and all action heretofore taken by the Board of Governors of the Federal Reserve System after February 11, 1942, in pursuance of Executive Order No. 8843 of August 9, 1941, is hereby confirmed and ratified. In the exercise of the au-

thority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

3. Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct; and, in the case of any property, or interest therein, subject to the control of the Secretary of the Treasury, when the Alien Property Custodian shall notify the Secretary of the Treasury in writing that he has so directed, the Secretary of the Treasury shall release all control of any such property, or interest therein, to the Alien Property Custodian.

4. Any outstanding order, proclamation, regulation, ruling, license, or instruction issued pursuant to, or relating to the administration of, any power or authority vested in the Alien Property Custodian by this Order shall remain in effect unless and until amended or revoked by the Alien Property Custodian.

FRANKLIN D. ROOSEVELT

The White House,
March 11, 1942.

Executive Order No. 9193.

(7 Fed. Reg. 5205)

Amending Executive Order No. 9095 Establishing the Office of Alien Property Custodian and Defining Its Functions and Duties and Related Matters.

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the

President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Executive Order.

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit

instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, money, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

(d) Any patent, patent application, design patent, design patent application, copyright, copyright application, trademark or trademark application or right related thereto in which any foreign country or national thereof has any interest and any property of any nature whatsoever (including, without limitation, royalties and license fees) payable or held with respect thereto, and any interest of any nature whatsoever held therein by any foreign country or national thereof;

* * * * *

4. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order. The Secretary of the Treasury and the Alien Property Custodian each shall make available to the other all information in his files to enable the other to discharge his functions, and shall keep each other currently informed as to investigations being conducted with respect to enemy ownership or control of business enterprises within the United States.

* * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive

Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 shall be administered by him in conformity with the provisions of this Executive Order.

7. In the exercise of the authority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

* * * * *

9. This Executive Order shall not be deemed to modify or amend Executive Order No. 8843 of August 9, 1941, and the regulations, rulings, licenses and other action taken thereunder. Any and all action heretofore taken by the Secretary of the Treasury or the Alien Property Custodian, or by any person, agency, or instrumentality designated by either of them, pursuant to sections 3(a) and 5(b) of the Trading with the enemy Act, as amended, or pursuant to prior Executive Orders, and any and all action heretofore taken by the Board of Governors of the Federal Reserve System pursuant to Executive Order No. 8843 of August 9, 1941, are hereby confirmed and ratified.

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose

of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended.

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3(a) and 5(b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941.

* * * * *

(Signed) FRANKLIN D. ROOSEVELT

The White House,
July 6 - 1942.

Opinion in the Matter of Leopold H. P. Klotz, et al.

OFFICE OF ALIEN PROPERTY CUSTODIAN
VESTED PROPERTY CLAIMS COMMITTEE.

Dockets No. 9 and 10
Claims No. 553 and 554

In the Matter of

LEOPOLD H. P. KLOTZ, and

NORTH AMERICAN INVESTING CO., INC.

STATEMENT OF CASE

This proceeding was initiated by Notice of Claim No. 553 (dated March 29, 1943) filed by Leopold H. P. Klotz and by Notice of Claim No. 554 (dated March 25, 1943) filed by the North American Investing Company, Inc., a Delaware Corporation, pursuant to regulations issued by the Alien Property Custodian on March [illegible] 1942 (7 Fed. Reg. 2290) and amended December 1943 (8 Fed. Reg. 16709). The claims were consolidated for a hearing.

The Custodian by Vesting Order No. 3, dated April 7, 1942 (7 Fed. Reg. 2698), vested certain properties consisting of notes issued by Luscombe Airplane Corporation (hereinafter referred to as Luscombe) to Leopold H. P. Klotz, (hereinafter referred to as Klotz), collateral notes issued by North American Investing Company, Inc., (hereinafter referred to as the North American Company) to Klotz, collateral security deposited with Klotz to secure payment of the collateral notes, a contract between the North American Company and Klotz, and all the interest of Klotz in shares of Luscombe; all of which property is described in detail in Exhibit "A" attached to Vesting Order No. 3. The vesting order also recited, among other things, a finding that the property was the property of nationals of a foreign country designated in Executive Order 8389.

Klotz's Notice of Claim alleges that the claimant is a "* * * * subject of a friendly country, Liechtenstein * * * *"

DETERMINATION

The claimants so clearly satisfied their burden of proving ownership on the date of vesting of the property subject to Vesting Order No. 3, that an extensive recital of the evidentiary facts relating to ownership seems unnecessary. * * *

There is no evidence tending to contradict Klotz's testimony that he owned the assets so used and there is no reason to believe that he held such assets in trust for any person or that he had acquired the assets in any manner other than that indicated above. * * *

The claimant, Klotz, is a resident of the United States and was a resident of the United States at the date of vesting. He was for many years a citizen of Germany, but we find, for the purpose of this proceeding, that he became a citizen of Liechtenstein not later than 1939. * * *

It becomes necessary to consider whether the claimants, on the basis of the facts found above, are entitled to a "divesting" of the property.

If the property had been vested after July 6, 1942—the date of Executive Order 9193 which amended Executive Order 9095—the answer would be in the affirmative because Executive Order 9095 as amended by Executive Order 9193 clearly contemplates that, unless good reason to the contrary appears, business enterprises and litigated claims of residents of the United States, even though they be citizens of enemy countries, are not to be vested.[1] In this respect

[1] "The term 'designated enemy country' shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term 'national' shall have the meaning prescribed insection 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a *designated enemy country* unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. * * * " (Section 10 of Executive Order No. 9193).

*Emphasis supplied.

Executive Order 9095 as amended by Executive Order 9193 paralleled in substance Section 2(c) of the original Trading with the Enemy Act which did not permit citizens of an enemy country who were residents of the United States to be treated as enemies unless the President so required by proclamation. Such a proclamation was not issued.

The Vesting Order in this proceeding was, however, issued prior to July 6, 1942 and recites that it is an expression of Presidential authority under Section 5(b) of the Trading with the Enemy Act as amended. On the date of the issuance of the vesting order the Presidential power to vest "any property or interest therein, of any foreign country or national thereof," had been delegated to the Custodian by Executive Order 9095 of March 11, 1942 (7 Fed. Reg. 1971). Executive Order 8389, as amended April 10, 1940 (5 Fed. Reg. 1400) relating to the freezing powers of the Secretary of the Treasury, granted to the Secretary, among other things, the power to regulate transactions and property interests of "any foreign country designated in this order or any national thereof" (Executive Order 8389, Section 1). Executive Order 8389 also contains an elaborate definition of the term "national" which includes "any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of the order." [Executive Order 8389, Section 5E(i)]. This definition of "foreign national" was incorporated by reference into Section 302 of the First War Powers Act, 1941, which amended 5(b) of the Trading with the Enemy Act into the form operative in this case.[2] Therefore, the term "foreign national" as defined in Executive Order 8389 and as employed in Section 5(b) as amended and as used in Executive Order 9095 before its amendment on July 6, 1942, seemingly encompasses Klotz for he is by his own claim and testimony a citizen of Liechtenstein which is a foreign country designated in Executive Order 8389, as amended, and hence is a "foreign national." For the same reason it would seemingly include the claimant, North American Investing Company, Inc., because although it is a Delaware Corporation, Klotz, a foreign national, held a "substantial part" of its "notes" and other "obligations". [Executive Order 8389, Section 5E(ii)].

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[2] All • • orders • • heretofore • • issued by • • the President or the Secretary of the Treasury under the Trading with the Enemy Act of October 5, 1941 [1917] (40 Stat. 411) • • are hereby • • ratified • • ." (Brackets supplied)

The grant to the Custodian of the wide authority to vest[3] was accompanied, however, by authority to adopt, in his discretion, a vesting practice less extensive.[4] The Custodian did adopt a vesting practice less extensive than his authority, a practice substantially corresponding to the provisions of the July 6, 1942 amendments to Executive Order 9095 and to the policy expressed in Section 2(c) of the original Trading with the Enemy Act. The vesting practice—as far as pertinent to this proceding—was not to vest the property of residents of the United States regardless of citizenship, except on information serving as the basis of an administrative judgment of cloaking.[5]

A similar development has taken place under Executive Order 9193. By Section 2(d) of this Executive Order, the Custodian has granted the right to vest any such property "in which any foreign country or national thereof has any interest." However, in the publication in which the Custodian announced his program thereunder there was no mention of seizure of neutral owned patented property, but only of enemy and enemy-occupied property. See "Patents At Work 1943", especially pp. 5-7. This practice, less extensive than the right granted in Section 2(d) of Executive Order 9193, has resulted in divesting orders in patent cases in which the divesting is on the ground of a mistake in vesting—corrected by finding that the claimant is not a national of a designated *enemy* country—but without tra-

[3] " * * * and *any property* or interest of *any foreign country* or *national* thereof *shall vest*, when, as, and upon the terms directed by the President * * *" (Section 302 of First War Powers Act of 1941). Emphasis supplied.

[4] " * * * and any property or interest of any country or national thereof shall vest *when, if*, and *upon the terms*, directed by the President * * *" It seems incontestible that Congress intended that the Custodian should be free to adopt a vesting practice, according to the exigencies of the situation, less extensive than the power to vest property of any person who has been "domiciled in, or a citizen or resident of a foreign country on or at any time since the effective date of this order" [Executive Order 8389, Section 5E(i)]. Executive Order 8389 was directed to the task of regulating transactions in the economic warfare which ante-dated Pearl Harbor and obviously was not directed to the narrower problem of vesting property—a problem not arising until the outbreak of the war. Emphasis supplied.

[5] General Counsel's brief states, "so far as we are aware no cases arose during the 9095 period in which the vesting was on the ground of 'national interest' apart from cloaking".

verse of the finding recited in the vesting order that the claimant is a national of a *foreign* country. See Divesting Orders 32, 33, 35, 37, 38, 57.

We conclude that the administrative practice of the Custodian during the 9095 period is based upon a construction of the broad terms of Section 5(b) as amended and of Executive Order 9095 which reflects the earlier legislative policy expressed in Section 2(c) of the Trading with the enemy Act and which is itself reflected in the July 6, 1942 amendments to Executive Order 9095. We further conclude that while an administrative construction is open to change by the agency—as the exigencies of the situation change—the unchanged practice does outline the standards whereby the agency purports to act as effectively as if they were expressed in a regulation. It follows, therefore, that, in the light of the Custodian's practice, a vesting which proceeded from the assumption—subsequently proved to be erroneous—that there was a "cloaking" transaction involves such a mistake of fact as authorizes a "divesting".

In so holding, we do not mean that the Custodian may not by regulations alter the construction manifested by his practice; nor do we mean that a practice in respect to vesting is relevant to the exercise of supervisory powers. We do not suggest, furthermore, that an administrative practice is controlling in purely discretionary judgments on matters not relating to the construction of jurisdictional statutes or Executive Orders; nor do we suggest that a divesting is possible merely because experience has demonstrated that a given vesting was less sound as a matter of policy than it as first appeared. We hold merely that the well established administrative practice of the Custodian with respect to vesting during the 9095 period justifies the finding that the vesting of the property of one who was at the time of vesting a resident of the United States and a citizen of a neutral and unoccupied foreign country—based upon the mistaken belief that he was a "cloak"—constitutes such a mistake of fact as authorizes a remedial divesting.

Accordingly, the claims of Leopold H. P. Klotz and North American Investing Company, Inc., are hereby allowed.

VESTED PROPERTY CLAIMS COMMITTEE

JOHN C. FITZGERALD, *Chairman*
MICHAEL F. KRESKY,
NUGENT DODDS.

(SEAL)

Date May 2, 1944

Annual Report

Office of

Alien Property Custodian

Fiscal Year Ending June 1945

(pp. 161-162)

Authority to Dispose of Title Claims

In the course of the vesting program the Custodian has taken title to a number of properties which may be proved to be owned by citizens of the United States and friendly foreign nationals.

Three factors account for the vesting of property which is or may be owned by American citizens residing in the United States. *First*, there have been technical errors in drawing up vesting orders; for example, in vesting orders covering thousands of patents there have inevitably been instances in which American-owned patents were included through clerical or tabulating machine errors in recording patent numbers. *Secondly*, there have been a few mistakes made in determining the ownership of property or in determining the citizenship or residence of the owners; as an illustration, properties have been vested because the record ownership was in enemy nationals and there was at the time of vesting no information available to indicate that the beneficial owners were actually American citizens. *Thirdly*, there are many properties of which ownership prior to vesting was claimed by American citizens but which the Office has concluded after exhaustive investigations were beneficially owned by nationals of enemy countries. This third group is the most important; it includes all of the cases in which the Office believes that transfers of property from enemy nationals to United States citizens during the years 1939 to 1941 were not bona fide but were made to evade seizure by the Government in the event of war. The conclusions of the Office in these cases may be upset if the American claimants can show that the transfers were actually bona fide.

The vesting of property of friendly foreign nationals[3] was, in many instances, the result of these same three

[3] As used here the term "friendly foreign nationals" includes (1) citizens of allied and neutral countries not residing voluntarily in enemy countries, (2) citizens of enemy countries residing

factors. It also resulted in large measure from certain policies of the Office during the war, of which the taking of title to patents and copyrights owned by residents of enemy-occupied countries is of predominant importance.

The Office has returned property to a number of persons who are both citizens and residents of the United States and who have satisfactorily established their pre-vesting ownership of the property. The legal basis for such returns is Section 9(a) of the Trading with the Enemy Act.

In view of legal uncertainties, however, and deeming it incumbent upon him to coordinate his action with the position taken in litigation by the Attorney General, the Custodian has adopted a policy of withholding action on the return of property to friendly foreign nationals until the authority to effect such returns is clarified by judicial decision or statutory enactment. The precise problem is whether Section 9(a) of the Trading with the Enemy Act permits the return of property to persons who are foreign nationals under the First War Powers Act, 1941, but who are not enemies. Under Section 9(a) of the Trading with the Enemy Act, a person who is not an enemy may recover property owned by him at the time of vesting. This means, if taken literally, that the Custodian may make returns to persons not enemies at the time of vesting. But under the authority of the First War Powers Act, the Custodian may vest the property of foreign nationals, including non-enemies. Thus the question has arisen whether a friendly foreign national may recover property pursuant to one act when the vesting of the property of such persons is authorized by a subsequent act.

In order to provide a clear statutory basis for the return of property to foreign nationals who are not enemies the Office has drafted a bill, which was introduced into the House of Representatives as H. R. 3479 on June 14, 1945, and subsequently introduced in slightly amended form as

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in the United States, and (3) United States citizens residing in foreign countries. All of these persons are "foreign nationals" within the meaning of the First War Powers Act of 1941. The adjective "friendly" is employed in the text of this Report to distinguish these groups of foreign nationals from nationals of enemy countries.

H. R. 3750 and later as H. R. 4571.[4] This bill provides that all returns to foreign nationals will be discretionary on the part of the Custodian and will not be made in instances where it would be contrary to the national interest.

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[4] Earlier attempts to obtain similar legislation were made by the Office in June 1944, and again in January 1945. The bills then introduced were not reported out by the Judiciary Committee of the House. H. R. 4571 was signed by the President on March 8, 1946, and is now Public Law 322, 79th Cong., 1st Sess.

No. 934.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *Petitioner*,

v.

UEBERSEE FINANZ-KORPORATION, A. G.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.

RICHARD J. CONNOR,
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Attorneys for Respondent.

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Of Counsel.

IN THE

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v.

UEBERSEE FINANZ-KORPORATION, A. G.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.[1]

At the time of argument petitioner filed a supplemental memorandum in which it is attempted to meet the challenge embodied in respondent's brief, reading as follows (p. 20):

> Since petitioner's attorneys rely almost entirely upon the sale and disposition language of amended § 5(b) to support their whole position, it seems nothing short of amazing that nowhere in their brief have they even undertaken to break down or even to criticize the reconciliation between the provisions of § 9(a) and the dispositive provisions of § 12 given in *Central Union*

[1] Submitted pursuant to permission of the Chief Justice communicated through the Clerk of the Court.

Trust v. *Garvan, supra*, 254 U. S. 554, 569, which presents a precise analogy to the reconciliation of § 9(a) with the dispositive provisions of amended 5(b).

At page 2 of their memorandum petitioner's attorneys state:

> The assumption that Section 12 conferred powers whose exercise would have been inconsistent during World War I with the obligation to return nonenemy property is erroneous. Section 12 was addressed to enemy (and ally-of-enemy) property only.

The burden of their entire memorandum is embodied in the latter sentence. The argument offered in support of this proposition is utterly empty. It is established beyond doubt by the decided cases that the dominion or dispositive provisions of § 12 are as applicable to non-enemy property seized under § 7(c) as to enemy property seized under that section, and that up until suit is brought under § 9(a) the Custodian may deal with non-enemy property in exactly the same fashion as with enemy property, even to the extent of conveying good title to a purchaser at an alleged inadequate price.

In the case of *Sielcken-Schwarz* v. *American Factors*, 60 F. 2d 43, cert. den., 287 U. S. 654, an argument identical to that submitted by petitioner was urged by the plaintiff therein and the Second Circuit Court of Appeals, in an interesting analysis, rejected the argument and, among other things, stated (p. 45):

> Section 12, as amended by Act March 28, 1918, §1 (50 USCA, Appendix §12)—before the custodian attempted to vote on the shares—not only gave him the powers of "a commonlaw trustee", which alone would have been enough, but explicitly provided that he should "in addition thereto, * * * have power to manage such property and do any act or things in respect thereof or make any disposition thereof * * * by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto * * * in like manner as though

> he were the absolute owner". *There is not the slightest reason to suppose that this was intended to apply only to property which was in fact enemy held*, and it would have been impossible to execute the purposes of the act if it had been. The custodian, having determined that the property was subject to the Act, might never discover his mistake; the owner might not apply to any court, might apparently acquiesce in his decision. The property must meanwhile be protected; good occasions not be let slip; all sorts of action might be essential in the very interest of the owner. (italics supplied)

Exactly the same reasoning was implicit in the opinion of Judge Holmes in *Central Union Trust Co.* v. *Garvan, supra*, 254 U. S. 554, 569.

At page 3, petitioner repeats a theme running through its main brief and reading as follows:

> As the Act then stood, the Custodian's powers under Section 7(c) were limited to the property of enemies or allies of enemies.

We feel that we have demonstrated the utter erroneousness of this statement in our main brief (pp. 14-20) and at the argument. It is beyond question that the seizure powers given to the Custodian under §7(c) covered both enemy and non-enemy property and that, providing he made an investigation and determination that the demanded property was owned by or held for the benefit of an enemy, the seizure was valid in every particular even though his determination might be erroneous. And it is submitted that virtually no seizure made under §7(c) could be an erroneous seizure. Pursuant to the Executive Order of February 16, 1918 and the rules thereunder, the Custodian prescribed a form of demand which embodied an express finding that the property belong to or was held for the benefit of an enemy or ally of enemy. (See Exhibit A attached) The only possibility of an erroneous seizure would be in the case where the Custodian spelled out facts in his demand which would

show on their face that as a matter of law the demanded property could not be enemy property.

Therefore, the dominion or dispositive provisions of §12 were clearly as applicable to enemy property as to non-enemy property. This being so, there is not one whit more problem involved in reconciling the dispositive provisions of § 5(b) with 9(a) than there is of reconciling the dispositive provisions of § 12 with 9(a).

In addition to the inequitable and impractical results flowing from petitioner's attempted interpretation of the retention powers of the Custodian under amended 5(b), which we have heretofore demonstrated, there is this added observation which is of major importance. By giving effect to the alternative remedies of § 9(a) (return of property in kind or proceeds), the Government can suffer no loss. On petitioner's hypothesis, however, there are heavy potentialities of loss to the American taxpayer. In those instances where the seized property has substantially depreciated in value while in the hands of the Custodian and is sold for less than the value at the time of seizure, the claimant would be entitled to a judgment in the Court of Claims for the value at seizure. The difference, on petitioner's own hypothesis, would have to be made up out of the Treasury of the United States.

Respectfully submitted,

RICHARD J. CONNOR,
BART W. BUTLER.
Attorneys for Respondent.

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Washington 5, D. C.,
Of Counsel.

EXHIBIT "A"

A.P.C. Form No. 106 File No. .....

ALIEN PROPERTY CUSTODIAN

Demand by Alien Property Custodian for Property

Extracts from "Trading with the enemy Act."

Sec. 7(c). (Here on the form are printed the seizure powers embodied in Section 7(c).)

Sec. 7(e). (At this point are printed the exculpatory provisions of Section 7(e).)

To.....

Address.....

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and said executive orders, after investigation do determine that the following money and other property, to wit:

.....

.....

is by you owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of.....

.....

Address.....

whom after investigation I do determine to be an (enemy) (ally of enemy) not holding a license granted by the President, and I hereby require that the said money and property shall be by you conveyed, transferred, assigned, delivered, and paid over to me as Alien Property Custodian to be by me held, administered, and accounted for as provided by law.

(Witness my hand and seal of office, this ..... day of .....191.....

.....

Alien Property Custodian

Report No. .....

Trust No. .....

(Strike out the inapplicable clauses.)

[This form taken from A.P.C. Form No. 116, Bulletin of Information issued by Alien Property Custodian, June 8, 1918, Washington Government Printing Office 1918, pp. 18-19.]

No. 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

TOM C. CLARK, ATTORNEY GENERAL, As Successor to the Alien Property Custodian, *Petitioner*,

v.

UEBERSEE FINANZ-KORPORATION, A. G., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

SECOND SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT.

Since the argument had in this case in May of this year, two significant decisions in respect of the question involved have been handed down in the Second Circuit.

The first is *Swiss Bank Corporation* v. *Clark, Attorney General, as Successor to the Alien Property Custodian*, D. C. So. Dist. N. Y., Civil Case No. 32-570, unreported, decided on August 15, 1947. In this case the problem involved was substantially identical to that which gave rise to the dictum in *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 797, cert. granted Feb. 7, 1947, No. 6, this Term, which dictum is to the effect that the remedy of a friendly foreign national whose property rights have been invaded by a seizure by the Alien Property Custodian is not by suit

under § 9(a) of the Trading with the Enemy Act, but rather through suit for just compensation in the Court of Claims. In the Swiss Bank case the plaintiff was a Swiss national and the pledgee of certain shares of stock as collateral for a money loan. The stock seized was that issued by certain corporations in this country, which stock was alleged by the Government to be owned by certain enemies, the pledgors thereof to the plaintiff bank. The Custodian, having vested such stock, the Swiss Bank sought to recover its possession by suit under § 9(a). The Government moved for judgment on the ground that the plaintiff was, on the pleadings, a foreign national and therefore disabled from suing under § 9(a). The court denied the motion, holding that plaintiff could sue under § 9(a) and that the *Silesian-American* decision, *supra*, was not controlling. Because the decision is unreported, it is printed in full in the appendix hereto.

The second case—of acute significance because decided by the same Circuit Court of Appeals which issued the opinion in the *Silesian-American* case—is *Standard Oil Company, et al.* v. *Markham*, CCA 2, decided September 22, 1947, (as yet unreported), on appeal from *Standard Oil* v. *Markham*, 64 F. Supp. 656. A recital of the rather lengthy set of facts is for present purposes unnecessary. It is sufficient to state that the question arose upon the facts as to whether plaintiff became a foreign national within the meaning of Executive Order 8785, § 5E iii (Petitioner's main brief, pp. 79-82), and as such foreign national disabled from suing under § 9(a) of the Trading with the Enemy Act.[1] This problem is discussed by the Court under Point 4 of its Opinion in the following language:

> 4. *Plaintiffs' Right to Sue.* As American corporations, the plaintiffs' right to bring suit to recover their property from the Custodian is, on its face, within the specific authorization of §9(a) of the Trading with the Enemy Act, 50 U. S. C. A. Appendix, §9(a). Neverthe-

[1] It is by virtue of this same Executive Order that the plaintiff in the instant case is placed in the category of a foreign national.

less, a question as to that right arises in view of the 1941 amendment to §5(b) of the Act. Previous to the amendment, §7(c) of the Act had authorized the vesting of property owned or held on behalf of enemy nationals; the 1941 amendment to §5(b) authorizes the vesting of property of all foreign nationals, whether enemy or not. Defendant claims that this amendment by necessary implication destroyed the right granted by §9(a) to nationals of friendly foreign powers to sue to recover seized property. If this were so, the plaintiffs' right to proceed here might be brought into direct question because of Exec. Order 8785, §5E(iii), 3 CFR, Cum. Supp., 948, 6 F.R. 2897. That order, for some purposes under the Trading with the Enemy Act, includes in the definition of foreign nationals any persons to the extent that they acted directly or indirectly for the benefit, or on behalf, of a foreign national.[a]

Thus there are two steps to the argument before its conclusion is reached. Taking these up in order, it is clear that there is an ambiguity in the Act which must be—and apparently soon will be—resolved by the Supreme Court. In *Uebersee Finanz-Korporation, A. G.*, v. *Markham*, App. D. C., 158 F. 2d 313, the court, one justice dissenting, reversed the decision of the district court in favor of the Custodian, to uphold the right to sue. On grant of certiorari, the case was argued in the Supreme Court in May, but has now been restored to the docket for reargument in the fall. *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 67 S. Ct. 1749. A like order for reargument was made in the companion case of *Silesian American Corp.* v. *Clark*, 67 S. Ct. 1748, on review of our decision in *Silesian American Corp.* v. *Markham*, 2 Cir., 156 F. 2d 793.[b] The parties have furnished us with the briefs on the issue as pre-

[a] Though defendant does not make the argument, it would seem possible to contend that, under this extensive definition, plaintiffs became enemy nationals after the outbreak of war, since their concealment of I. G. assets continued thereafter. Such an argument would not require restricting the scope of § 9(a).

[b] Notwithstanding some interpretation of this case as full support for the Custodian's position, *cf.* 56 Yale L. J. 1068, it does not go so far; for only at issue was the question whether a claimant had some remedy in some court, thus making unjustified the refusal of a corporation to transfer stock on its books to the Custodian.

sented to the Supreme Court, and these have been helpful.

The opposing points of view are stated in the two opinions of the Court of Appeals in the *Uebersee* case. The plaintiffs' point of view is that the amended §5(b) is not to be treated as an amendment by implication of §9(a), but that the statutes must be read together and each given effect. So considered, the effect of the change in law is to enable the government to meet the real evil of the cloaking of enemy property interests by apparent holdings by nationals of friendly powers. Seizure is permitted against such nationals, who can then secure a return only upon showing that the property is genuinely their own. While their suits were pending, title to the vested property would be *prima facie* in the Custodian, pursuant to §5(b). Limitation of the amendment thus to procedure is urged as a natural interpretation, particularly in view of the constitutional difficulties attendant upon an interpretation that the amendment took away the right of nationals of friendly foreign powers to sue. By §7(c), the remedy of claimants under the Act is made exclusive; and hence the amendment if thus interpreted would be subject to attack as confiscatory. Moreover, the Custodian has failed to secure such legislation from Congress; indeed the Senate in 1946 struck out a provision from a pending bill in order "to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a)," Sen. Rep. No. 1839, 79th Cong., 2d Sess., and the bill as thus amended became law on August 8, 1946. 60 Stat. 925, 50 U. S. C. A. Appendix, §33.

Defendant, however, contends that this is too limited effect to give to an important amendment, granting the President power to vest such property in an agency or person, and "upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." He says that there are no constitutional difficulties, because a claimant of a friendly nation has a right to recover just compensation in the Court of Claims for any property taken, that the restriction of remedies by §7(c) is only of those for return of the "property" not of compensation for its

use, and that his administration of enemy assets will be vastly hampered if he cannot sell or otherwise make use thereof until it has been determined that no part is to be returned to nationals of friendly countries.

Were we forced to a final decision at this time, we should be content to accept the precedent of the decision in the Court of Appeals on the grounds ably stated by Chief Justice Groner. The power of seizure and confiscation, particularly as against a friendly alien, is so drastic and so novel that we think it should not be extended beyond bounds clearly set. The concession of a remedy in the Court of Claims tends to support this view. While the practical advantages to the Custodian of the restricted remedy are obvious, yet it hardly seems that Congress would have taken an apparently drastic step in international law only to achieve indirectly this merely procedural change. *Cf.* 56 Yale L. J. 1068.

But even if the defendant's general position be accepted, we think the second step of the argument presents difficulty in application beyond the general terms of the decree below. This promise would afford an added ground, a further buttress, for the refusal to return the property found below to be substantially and equitably that of I.G. But we do not see how it assists the defendant beyond this. Under the Executive definition of a foreign national, so far as here pertinent, it includes other persons only "to the extent" that they acted directly or indirectly for the benefit or on behalf of a foreign national. Where plaintiffs were acting for themselves, as the District Court found with respect to the purchases before 1939, we find nothing in these provisions to bar the plaintiffs from suit. Accordingly we conclude that application of the asserted principle would not change the final outcome of this action.

Thus the same Circuit Court of Appeals which uttered the dictum in the *Silesian-American* case in favor of a Tucker Act remedy as against a §9(a) remedy, not only specifically labels its former utterance a pure dictum, but as effectually as possible repudiates that dictum and expresses its wholehearted approval of the opinion of Chief Justice Groner in the instant case in the court below. In

the light of this action of the Second Circuit Court, every shadow of apparent conflict of decision between that Circuit Court and the Circuit Court of Appeals of the District of Columbia vanishes completely.

Thus the latest pronouncement of the Circuit Court of Appeals should be treated as prevailing. The effect is simply a reversion to and re-approval of the same Court's decision in *Miller, Alien Property Custodian*, v. *Kaliwerke Aschersleben Aktien-Gesellschaft et al*, 283 F. 746 affirming *Garvan, Alien Property Custodian*, v. *Certain Shares of International Agricultural Corporation, etc.*, 276 F. 206. The latter case involved substantially the identical question involved in the present *Silesian-American* case, *supra*, and arrived very logically at the conclusion that the plaintiff in that case had an adequate remedy under Section 9(a) of the Act.

In the portion of the opinion of the Second Circuit quoted above, two references are made to the article appearing in the June 1947 issue of the Yale Law Journal, 56 Yale L. J. 1068. This note is devoted to a discussion of the instant case and the *Silesian-American* case. The note is a very carefully considered and objective analysis of the problem presented. The Court's attention is urgently invited thereto.

At p. 39, footnote 13 of our main brief, reference is made to the letter of Secretary Byrnes submitted to the House Judiciary Subcommittee considering the then pending H.R. 5089. Prior to the submission of that letter a conference was held at the State Department at which representatives of several of the Government agencies were present. Also present was a representative of the Swiss government. At the conference the Swiss government submitted for consideration a copy of the following document as a statement of its position:

Aide-Memoire.

The Sumners Bill H.R. 5089 (Committee Print of May 11, 1946) to amend the First War Powers Act of 1941, provides that a foreign country or national thereof may not institute a suit for *return* of any property or interest vested in the Alien Property Custodian. The sole relief for foreigners—even if they are allied or neutral nationals—would be a suit against the United States in the Court of Claims for *just compensation*.

As already declared during informal conversations between officers of the Legation of Switzerland and the State and Justice Departments, the Swiss Legation feels impelled to point out that the Bill, if enacted, would infringe legitimate rights of Swiss citizens. It will be recalled that Swiss property in the United States was provisionally seized either to protect it or because the interests at stake were ambiguous. The Legation was, however, repeatedly assured that no legitimate Swiss interests would be harmed.

The Swiss authorities therefore venture to expect that Swiss property which by now is either beyond the influence of a state at war with the United States, or which proved to be genuinely Swiss, will be *returned*.

The Bill according to which only property of Americans would be eligible for return, whereas foreigners would be confined to claiming a dollar amount, could hardly be construed otherwise than an act of nationalization. Such a measure would be inconsistent with basic principles inherent in treaties of friendship and commerce and would also be contrary to the promotion of international cooperation, in general, and international trade in particular.

June 24, 1946.
N. 18 Sch/rl

Permission has been given to state that the contents of the foregoing *Aide-Memoire* continues to represent the attitude of the Swiss government.

Respectfully submitted,

RICHARD J. CONNOR,
BART W. BUTLER,
Attorneys for Respondent.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 32-570

SWISS BANK CORPORATION, *Plaintiff*

against

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian, *Defendant*

OPINION.

Bright, D. J.

Defendant moves for judgment on the pleadings upon the ground that the complaint fails to state a claim upon which relief can be granted, for the reason that it appears that pliantiff is a national of a foreign country whose property the Alien Property Custodian was authorized to vest and retain under § 5(b) of the Trading With the Enemy Act (50 U.S.C.A. App. § 5(b)), as amended by Title III of the First War Powers Act of 1941 (50 U.S.C.A. App. § 616), and under Executive Order No. 9,095 as amended.

Plaintiff claims that it has the right to maintain this action to recover the property mentioned in the complaint under § 9 of the Trading With the Enemy Act.

The complaint is laid under the Trading With the Enemy Act. Plaintiff is a Swiss citizen and not an enemy or the ally of an enemy of the United States or a national of a designated enemy. On April 20, 1946, the Alien Property Custodian served notice upon plaintiff purporting to vest, pursuant to § 5(b) mentioned, shares of common and preferred stock of Schering Corporation, a New Jersey corporation, other shares of common stock of Schering Corporation, a New York corporation, and other shares of common stock of Sherka Chemical Company, Inc., a New York

corporation. On December 1, 1937, plaintiff had loaned Chemical & Pharmaceutical Enterprises, Ltd., another Swiss corporation, 5½ million Swiss francs and had taken as collateral security the stocks mentioned, upon which loan, there remains unpaid over 5¼ million francs, for which plaintiff has a lien upon the collateral mentioned. At the time of vesting, and for a long time prior thereto, the stocks had been registered in the name of Gunther & Co., for the benefit of plaintiff. Without consent of the plaintiff and without making just compensation to it, and upon demand of the Alien Property Custodian, who claimed to be the owner of the stock aforesaid, on or about June 18, 1942, the New Jersey Schering Corporation cancelled the certificates and issued new ones in the name of said Custodian. On August 21, 1945, plaintiff duly made and filed with the Alien Property Custodian a notice of its claim to said securities and property, but made no application for a hearing or to the President, as mentioned in § 9(a). It now prays judgment that the court declare it to be the pledgee of the securities mentioned and entitled to hold the same as collateral to said loan, that defendant has no title or interest therein, that he be enjoined from asserting to have any such, from exercising any rights of ownership or control thereover, from disposing of said securities, and from disposing of or interfering with the rights, patents, and property of the corporations whose securities were thus pledged, and from granting or offering to grant any license with respect thereto. It also prays that the vesting order be declared null, that the defendant be directed to transfer to plaintiff as pledgee the certificate issued to defendant, or, in the alternative, that such certificates be cancelled and the former be reinstated on the books of the corporation. Defendant has joined issue, the answer, besides a general denial, alleging two defenses which are in substance, one of them, that the transactions upon which plaintiff seeks to recover were a cloak to conceal the fact that Schering A. G., a national of Germany, was the real owner of the stock, and

the second, that plaintiff was a corporation incorporated within a country other than the United States and doing business within the territory of a nation with which the United States was at war, and as such was and is an enemy within the meaning of the Trading With the Enemy Act and has no standing to institute or maintain this action.

Section 5(b) as so amended, so far as material here, provides:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe * * * (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use * * * or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes;" * * *

The powers and duties of the President under this section were delegated to, and invested in, the Alien Property Custodian by Executive Order No. 9,095 (7 F. R. 1971 as amended), and it was further provided that any property or interest therein of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever he shall so direct.

It is not questioned that Switzerland was such foreign country, nor that plaintiff was a national thereof.

Section 9 of the Trading With the Enemy Act, under which plaintiff claims, so far as material, provides:

> "(a) Any person not an enemy or ally of an enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him * * * may file with the said Custodian a notice of his claim, under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, * * * to said claimant of the money or other property so held * * *; Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity * * * in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business * * * to establish the interest, right, title or debt so claimed, and if so established, the court shall order the payment, conveyance, transfer, assignment or delivery to such claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

The vesting order of which complaint is made, dated April 18, 1942 (7 F.R. 2922) states that the Custodian, finds upon investigation that the stock involved was "the property of nationals of a foreign country", and that the action therein taken was in the public interest, and orders and declares that such properties, including all interest therein, were thereby vested in the Custodian, to be held, used, administered, liquidated, sold, or otherwise dealt with in the inter-

est and for the benefit of the United States. It did not find that the stocks were the property of an enemy alien, nor an ally of one, and directed that such property and the proceeds thereof be held in special account pending further determination; and also, "This shall not be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof * * * if and when it should be determined that such return or compensation should be made."

The contention of the defendant is that under § 5(b) and Executive Order No. 9,095, the Alien Property Custodian was authorized to vest property, and that as such vesting order was authorized by law, and, therefore, the title of the Custodian legal, plaintiff cannot maintain the action because it no longer had any interest in the property. It is further contended that, if plaintiff is entitled to any relief or compensation for the property seized, it can recover therefor under the Tucker Act if it shows itself to be a friendly alien. It further contends that § 9(a), under which plaintiff claims the right to maintain the action, is available only to correct seizures made under a mistake of fact or law; in other words, to permit recovery by those as to whom seizure was legally wrong when made.

As before stated, plaintiff claiming not to be an enemy or ally of an enemy, affirms that its only remedy is under § 9(a), § 7(c) of the Trading With the Enemy Act providing: "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, * * * delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act"; and that because of that limitation, it has no remedy under the Tucker Act.

I think the plaintiff is right. The case of *Uebersee Finanz-Korporation* v. *Markham*, 158 F. (2d) 313, seems to be directly in point. There the complaint was dismissed and that dismissal reversed on appeal. Plaintiff, a Swiss

national, was the owner of stock in sundry American corporations which the Custodian had seized as the property of a foreign national and had vested in himself. Plaintiff sued under § 9(a), alleging that it was not an enemy or ally of an enemy and that the property was not then or any other time held for an enemy or ally of an enemy. The defendant's motion to dismiss was upon the same grounds as here asserted, and it insisted that under § 5(b) the vesting was absolute and not subject to attack, and that plaintiff might obtain just compensation by way of suit in the Court of Claims. It was held that plaintiff's right to recovery was limited by the terms of § 7(c) of the Act to a suit under § (9(a), for only to that extent and in that manner had the United States consented to be sued. It was further decided, answering defendant's contention, that since the amendment of § 5(b), § 9(a) was no longer applicable, that the amendment to § 5(b) did not repeal, expressly or impliedly, the existing terms of § 9(a), and, reading them together, the two sections did not conflict but constituted a reasonable program to meet the emergency of the war.

The determination there made, that § 9(a) allows any person not an enemy or an ally of an enemy to sue the Custodian in the federal courts, had previously been upheld in *Markham* v. *Cabell*, 326 U. S. 404, 410, where Mr. Justice Douglas wrote:

> "The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of the law leaving another untouched, the two were designed to function as parts of an integrated whole.'

That suit under § 9(a) is plaintiff's only remedy, limited as such by the provisions of § 7(c), was long since decided

in *Becker Co.* v. *Cummings*, 296 U. S. 74, 79; which also held that the provisions of § 9(a) must be broadly construed to give effect to its remedial purpose. (p. 80). And it has been held that plaintiff here would have no remedy in the Court of Claims. *Escher* v. *United States*, 68 Ct. Cls. 473, 478, cert. denied 281 U. S. 752. See also *Josephberg* v. *Markham*, 152 F. (2d) 644, 649; *Dracger Shipping Co.* v. *Crowley*, 49 F. Supp. 215, 218.

It would seem that the title vested in the Custodian is but a defeasible one subject to being divested by a proper suit under § 9. *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 567, 569; *Salamandra Insurance Co.* v. *New York Life Insurance & Trust Co.*, 254 Fed. 852, 860. I do not think *Silesian American Corp.* v. *Markham*, 156 F. (2d) 793 is controlling.

The motion is denied.

JOHN BRIGHT
United States District Judge

August 15, 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934.

TOM C. CLARK, Attorney-General, as Successor to the Alien Property Custodian,

Petitioner,

v.

UEBERSEE FINANZ KORPORATION, A. G.,

Respondent.

BRIEF *AMICUS CURIAE* FOR THE NATIONAL FOREIGN TRADE COUNCIL, INC.

WM. HARVEY REEVES,
Counsel for Amicus Curiae The National Foreign Trade Council, Inc.

CHARLES R. CARROLL.

THE COURT PRESS, N. Y. C.

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UEBERSEE FINANZ KORPORATION, A. G.,

Respondent.

BRIEF *AMICUS CURIAE* FOR THE NATIONAL FOREIGN TRADE COUNCIL, INC.

Scope of the Brief.

The principal concern of the *Amicus Curiae* is in the effect that a decision in this case must inevitably have upon United States trade with all countries of the world with which the United States does business or hopes to do business and upon the status of American property within those countries.

The Court is here called upon to interpret a Federal statute as it applies to certain property within the United States owned by a non-enemy alien. In doing so this Court must deal with such property and interests generally in the United States. The policy in respect to such property is enunciated in relevant constitutional, treaty or statutory provisions only the last of which are emergency war legislation. The decision of this Court will doubt-

less be read and examined with the keenest interest throughout the world; and the conclusions in this case will have an important influence upon the development of future policy and procedure necessary to resolve the complicated problems of readjustment of property rights and commercial obligations affected by war and war measures. It can be assumed that our attitude will be reflected in that of foreign governments toward American property similarly affected—either in emulation or by way of retaliation.

It is not considered appropriate to this brief to discuss the facts or the legislative history of the Statute under consideration, since these matters will be presented to the Court in the briefs of the parties to the action. Our purpose is to present to the Court certain considerations which we regard as of general interest and significance to the business community, and particularly that segment of it engaged principally in international trade. As our traders and investors wish to be secure in their persons and property in their ventures in foreign lands, they are concerned that corresponding security be afforded nationals of those lands as to their persons and property in this country. Such security must be, and in our opinion is, afforded only when reinforced by access to courts of justice on the same basis as citizens.

The Issues.

Owing to the manner in which this case comes up to this Court, the issues have been reduced to a limited and definite compass. By the granting, without opinion, of a motion to dismiss the complaint, the District Court denied the plaintiff, a Swiss corporation, the remedy of a judicial review of the propriety of the taking of its property by the Alien Property Custodian, and of judi-

cial determination whether it is entitled to recover the "vested" property. The Court of Appeals, holding the lower Court in error, reversed and remanded the case. Thus the issue before this Court is simply whether, in a situation such as this, a Swiss national, or any other non-enemy national, shall have his day in court or shall not have it.

This Court is not, at this time, confronted with any issue as to the propriety of the taking, or as to the ultimate right of the claimant to have his property back. The effect of the motion to dismiss is, for our purposes, to admit the plaintiff's allegations, and argue that, even admitted, no cause of action is pleaded which the Court may entertain.

The alien proprietor has been deprived of property by an act of an administrative agency, and now seeks a judicial direction for its return. The agency (the Office of Alien Property, as successor to the Alien Property Custodian) having the property is not content to submit its administrative action to judicial review, but insists that having made an *ex parte* determination and acted thereon, the deprivation must stand forever, unless the agency in its uncontrolled discretion and solely as a matter of grace, should re-examine its own conclusion and find that return of the property is "in the interest of the United States". The Custodian suggested, in palliation, that a claim for "just compensation" may be sued out in the Court of Claims.

In terms of the statutory provisions involved, the issue may be stated as whether or not paragraph 5 (b) of the Trading With the Enemy Act, as amended by Title III of the First War Powers Act of 1941, deprives non-enemy aliens of the remedy of judicial review and relief accorded them by paragraph 9 (a) of the Trading With the Enemy Act; and, related intimately to this question, the issue

whether, if paragraph 5 (b) be so interpreted, it is repugnant to the Fifth Amendment to the Constitution of the United States, and so void, and the further issue of whether it is in derogation of provisions of our Treaty of Commerce and Amity with Switzerland, of 1850.

Any other specific issues raised are, in the opinion of the *Amicus*, collateral or subordinate to those referred to above. This seems to have been the prevailing view in the Circuit Court of Appeals.

Summary of Argument.

I. The 1941 War Legislation was intended to provide authority for conservation and preventive measures, but not for permanent retention of property of non-enemy aliens.

II. To deny a friendly alien the right to reclaim his property is contrary to the policies of the United States and to the fundamental concepts of the Constitution.

III. The denial of the right of an alien to have the Courts determine his status as a friendly or enemy alien is contrary to the Treaties of Friendship.

IV. The decision of the Court of Appeals should be affirmed.

POINT I.

The 1941 War Legislation was intended to provide authority for conservation and preventive measures, but not for permanent retention of property of non-enemy aliens.

The *Amicus* assumes that the legislative history of the First War Powers Act, and the related Executive Orders, will have been adequately covered elsewhere than in this brief. It is nevertheless relevant to point out summarily certain differences between the historical facts which form the background of this legislation, and the essential premises of the Custodian's arguments. Also, certain differences between the situation in World War I and that in World War II are notable and essential to a clear understanding of the implications of the statutory provisions.

(a) In World War I, this country became a belligerent in April, 1917, and a comprehensive Trading With the Enemy Act was enacted October 6, 1917. The statutory Custodian was given the right under Section 6

> "to receive all money and property in the United States due or belonging to an enemy, or ally of enemy * * * and to hold, administer, and account for the same under the general direction of the President and as provided in this Act."

The words "enemy" and "ally of enemy" were explicitly defined in Section 2 of that Act. Section 7 (c), as amended, authorized the President to require the transfer to, or the Alien Property Custodian to "seize" enemy or ally of enemy property. Sections 8 and 9 provide for judicial review, and in proper cases, relief, to

> "any person not an enemy or ally of enemy"

in respect of any property or interest affected.

The simplicity of these statutory provisions is concealed by their elaborate wording, but the result is positive: any person, citizen or alien, title claimant or creditor, was afforded the remedy of a judicial determination of whether he was or was not an "enemy or ally of enemy" and if he was not, he received back his property or collected his debt, or established his lien, as the case might be.

All of these sections, however amended, are still in force and effect. Naturally only when this country is at war and has "enemies" can seizures be made, but remedial provisions such as 9 (a) are in effect until their remedial purpose has been accomplished, or some statutory prescription has run.

Markham v. *Cabell*, 326 U. S. 404.

At this writing we are not at war with Switzerland, so Swiss nationals are neither enemies nor allies of enemies.

(b) As to World War II, this nation formally became a belligerent in December, 1941, and the First War Powers Act, incorporating the amended version of Section 5 (b) of the Trading With the Enemy Act became law December 18, 1941. This section included the power to

> "investigate, regulate, direct and compel • • • any acquisition • • • of • • • any right, power or privilege with respect to • • • any property in which any foreign country or a national thereof has any interest, • • •"

and provides that when so ordered, any such property

"shall vest * * * in such agency"

as might be designated, to be held or otherwise dealt with

"in the interest of and for the benefit of the United States, * * *"

The Alien Property Custodian has taken the position that "vestings" in World War II are by virtue of this provision, rather than under the previously enacted Section 7 (c). Thus, in order to vest property, it was no longer necessary to find that it was owned by an "enemy or ally of enemy", but it was customary to recite in vesting orders that such action was deemed

"necessary in the national interest."

It is necessary to observe that upon its issuance April 10, 1940 and by virtue of Executive Order 8389, blocks had been set up on property and interests of nationals of certain "designated" countries, under what was known as "foreign funds control". As German military operations expanded, the list of designated countries lengthened. This list eventually included not only enemy or ally of enemy countries and enemy-held countries, but nearly all countries of the world including neutrals and our own allies. The broad wording of Section 5 (b), must thus be attributed to a desire for legislative ratification of this regime, although we may concede a conscious intent to authorize as drastic controls over all alien property as might be necessary, once this country became a belligerent.

Specifically, Switzerland was made a "designated foreign country" on June 14, 1941, within the meaning of Executive Order No. 8389, as amended, but at no time have its nationals been "enemies" or "allies of enemies" simply by reason of nationality.

The "interest of the United States" as this concept appears in the First War Powers Act amending Section 5 (b) of The Trading With the Enemy Act is not, as has been contended, to be construed *in vacuo*.

The purpose of Foreign Funds Control was originally to prevent the German authorities from acquiring by duress, and utilizing, the resources of the governments and nationals of invaded areas, and conserving those resources for their true owners. When this nation became a belligerent, there was added to this preventive motive, the traditional "interest" of preventing the enemy government from marshaling or utilizing *any* resources within our jurisdiction or control, for the conduct of hostilities against this nation. This concept was, to be sure, expanded into that of full-scale "economic warfare" as the military situation deteriorated, but this development should not now confuse our thinking. The sequestration of property authorized during the period of actual hostility, should not be crystallized into a permanent policy, now that hostilities have ended and there is obviously no real danger that any funds or property can be availed of by the enemy against "the interest of the United States".

During the war, although the Foreign Funds Control "froze" foreign assets here, there was no substantial "vesting" of non-enemy property, other than patents and intellectual property. Nor, it would seem, was vesting necessary or intended, in view of the limitations upon the delegation of authority to the Alien Property Custodian, to be found in Section 2 of Executive Order No. 9095 of March 11, 1942. In case of such vesting, the Custodian first had to determine that such action was in the interest of the United States.

Taking these circumstances in the aggregate, there is no basis for the assumption that Congress in its very broad grant of power to the Executive in the first weeks

of this War, intended to authorize confiscation, or even general expropriation, of non-enemy property. If it did, its publicly expressed concern over the plight of citizens of the invaded countries was the height of hypocrisy, and irresponsible disregard of constitutional safeguards and treaty obligations. Such an attitude of hypocrisy, should not be attributed to our national legislature, in the absence of compelling proof—and such proof has not been adduced.

Congress did, in effect, legislate to permit, and the President did authorize the exercise of the power of seizure, not alone as to enemy property, but as to property of "designated foreign nationals". One of the obvious reasons for this action was that in the case of any person, citizen or alien, his loyalty might be suspect, or his "hostility" might be considered sufficiently dangerous that the preventive sequestration of his property was justified. The occasion for this extreme discretionary power has definitely passed with the close of hostilities. Whatever criteria were applied in determining "the national interest", their application should now be subject to judicial review and reinterpretation in more sober fashion. If this had not been intended, it is pertinent to suggest that the agency concerned, or Congress, should have given some thought to amending Sections 8 and 9 of the principal Act.

So, while the categories of persons whose property became subject to taking was largely expanded, it does not follow that the "vesting" of World War II was different in legal concept or effect from the "seizure" of World War I. This the Alien Property Custodian has denied, and has contended that "vesting" is conclusive and final, whereas "seizure" was not. The *Amicus* believes that he is in error on both counts. Certainly this Court, in *U. S.*

v. *Chemical Foundation*, 272 U. S. 1, held that seizure of enemy property was so effective as to permit good title to be transferred. And the Alien Property Custodian has himself argued before Congress that he cannot rely upon the validity of his own "vesting" if it is questioned by suit, and hence such suits should be barred.

(Hearings on HR 5089, 79th Congress, Second Session, p. 9, letter of James E. Markham)

We believe the Custodian has been confused by the concept of "transfer of title", and has been more conscious of his powers and prerogatives than of his duties and responsibilities to the beneficial owners of property coming into his possession and control. He has appeared to construe "the interest of the United States" in the narrow sense of immediate pecuniary interest of the government, which naturally implies the retention of whatever of value may have been acquired during the War. This would take no account of the major "interest" which was winning the War, and should be now a wholehearted recognition and implementation of those rights of the individual which we trust our success in the War will preserve. It is not enough, indeed, that the interpretation of this latter "interest" should be entrusted to the uncontrolled discretion of an agency which has for five years exercised plenary powers over private rights and interests. It is essential that the salutary process of judicial review should be given the broadest possible play.

We submit that it was not the intent of Congress at any time to deny to non-enemy aliens access to our courts to support their claim to recapture their property. The *Amicus* is not pleading the cause of enemy alien owners of vested property, since the ultimate disposition of that property has still to be legislated. Nor, in this case at

its present juncture, is the issue of the actual return of the non-enemy property before the Court. We simply contend that the retention by the Custodian of any person's property, without opportunity for judicial review of the propriety of such retention, amounts to confiscation, and cannot be

> "necessary in the national interest."

The Custodian, on the other hand, apparently believes that no alien, friendly or otherwise, has a right to court review of the Custodian's exercise of discretion. He argues that the process of "vesting" is complete and perfect in itself.

That the Custodian has not too great confidence in this position is shown by his course in the last few years. Claiming that he could not otherwise divest the Federal Government of title to property taken and yet admitting that certain property he had vested should be returned, the Custodian asked Congress for additional legislation. The then Custodian sponsored a bill, H. R. 3750—79th Congress, First Session, reintroduced as H. R. 4571—79th Congress, Second Session. This legislation was permissive in form and was worded so that the return of non-enemy property should have the sanction of Congress. On the hearing of this bill (H. R. 3750) the Department of State sent a communication reading in part as follows:

> "It has become increasingly apparent that if serious embarrassment is to be avoided the property so vested must be returned." (Record of hearings—Page 3.)

The reference is to property other than enemy property and property vested for reasons other than that it was enemy. The proposed legislation as drawn sanctions the return of property of non-enemies but does not require

the return of property of non-enemies whom for one reason or another, the Custodian may regard as "hostile"; which is to say, in effect, persons ineligible by certain criteria set by the Custodian. Property may be returned under the terms of this legislation, upon a finding by the Custodian *inter alia*

> "(3) that the property or interest claimed * * * was not * * * held or used * * * pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a)(2) hereof;" [an enemy interest or its equivalent,] "and
>
> (5) that such return is in the interest of the United States".

The National Foreign Trade Council, Inc., *Amicus*, appeared at these hearings, and while not opposing this legislation, pointed out several defects in it, one of which was that it did not cover such situations as we have in case at Bar. The legislation was enacted as the Act of March 8, 1946 and is now Section 32 of the Trading With the Enemy Act. The Custodian then proceeded to introduce legislation which would have, in effect, converted these criteria under this permissive section into restrictive criteria. The new bill contained among other provisions the following (H. R. 5089 reintroduced as H. R. 6890—S. 2378):

> "Sec. 33. (a) A foreign country or national thereof as defined pursuant to section 5 (b) hereof may not institute, prosecute, or further maintain a suit pursuant to section 9 (a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or in-

terest acquired by the United States prior to December 18, 1941), or the net proceeds thereof".

In the several hearings on this Bill, both before the House and in the Senate the National Foreign Trade Council, Inc. appeared, strenuously objected and filed a brief of its objections in both Houses. This legislation did pass the House (Report No. 2398) but the Committee on the Judiciary of the Senate accorded a hearing and struck out the Section 33 (a) to which the *Amicus* had filed its objections. In conference, the House receded, and the extensive amendments to the principal act were passed without this feature. (Act of August 8, 1946 adding Sections 33 to 37 inc.)

The Custodian, having thus failed to induce Congress to legislate his unacceptable provision of law, is now, somewhat inconsistently, urging before this Court that, after all, it was the law all along, and in effect urges a confirmation of this discretionary power. The *Amicus* does not feel that, if any real doubt existed at any time, the Court should be inclined to sanction by interpretation, a position which the Congress has definitely declined to sanction by legislation.

The correct position, it would seem, is that any person not an enemy or ally of enemy should, as intended by Section 9 (a), be given his day in court and a full opportunity, on a proper showing, for such relief as is appropriate to his particular situation, including the return in specie of his property. This, we believe, is the only position consistent with our Bill of Rights, our treaty obligations, and "the national interest" as that phrase should be construed.

POINT II.

To deny a friendly alien the right to reclaim his property is contrary to the policies of the United States and to the fundamental concepts of the Constitution.

The last Congress passed an act entitled "An Act to Improve the Administration of Justice by Prescribing Fair Administrative Procedure" (c. 324, P. L. 404). The attention of this Court is directed to this salutary legislation. In particular, the *Amicus* refers to § 10, paragraph (e):

> "e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court

> shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (60 Stat. 243).

Particularly is the *Amicus* interested in the above numbered provisions "5" and "6". Here the Court to which application is made, should determine whether or not the action of the Agency (in this case, the Custodian) is in fact supported by substantial evidence, and should ultimately substitute for a determination by the agency the decision of the Court, after probative facts have been freely presented by both of the parties.

There is no reason to believe that the Custodian was intended to be immune from the provisions of this administrative act, since the rules are clear for the review of just such an act as is here before the Court. This conforms to the statements contained in a recent decision of this Court.

> "Every act of government may be challenged by an appeal to law as finally pronounced by this Court. * * * When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy." (Concurring opinion of Mr. Justice Frankfurter in *United States* v. *United Mine Workers of America and Lewis*, decision announced on March 6, 1947.)

The procedure set forth in the Administrative Procedure Act is an implementation of the due process clause of our Constitution. The remedy afforded by § 9 (a) of the Trading With the Enemy Act is adequate to meet

the constitutional requirements and the procedure set forth in the Act above quoted.

Becker Steel Co. v. *Cummings*, 296 U. S. 74;
Russian Volunteer Fleet v. *United States*, 282 U. S. 481.

In fact if 9 (a) was nullified by the subsequent enactment of the First War Powers Act, as contended by the Custodian, the Administrative Procedure Act which became law but recently would grant a new and independent right of action to review the Custodian's seizure and withholding.

A still further reason why the Custodian's position is untenable is his unwarranted assumption that a cause of action for compensation before the Court of Claims would be an adequate remedy to meet the Constitutional requirements of "due process."

The Fifth Amendment says:

> "No person shall • • • be deprived of life, liberty, or property, without due process of law;"

And it also says:

> "nor shall private property be taken for public use, without just compensation."

The Amendment does not justify the assumption, apparently made by the Custodian, that depriving a person of property without due process of law (which is invalid in itself) may be made less offensive when, by the award of compensation, its taking is removed from the second and independent prohibition.

The Custodian's refusal to return the property, makes "vesting" a permanent seizure *ab initio* and gives rise to the observations that the property was taken without

notice, or hearing, and for no announced purpose or reason. The prohibition against deprivation without due process of law is complete; it is not conditional or discretionary merely if a possibility for compensation therefor exists.

On his own interpretation that a right to claim for just compensation in the Court of Claims is adequate to meet all standards set by the Constitution and the administrative act, the Custodian again finds himself in logical difficulties. The reason why the property was taken is not before the Court. The minority opinion (App. D. C.) implies a possibility that the retention was on the ground the Custodian found it "hostile" property. Assuming this, if his original determination is correct, *i. e.*, that respondent here is proved to be an enemy alien, then the property is held for such future determination as may be meted out by this Government to all enemy property. If, however, the Custodian was in error, then (contrary to the Custodian's belief and intention) the property must have been taken at the time of its vesting, for a public use. At the point when the friendly alien is found by the Court of Claims to be such, and is awarded compensation, he may well ask for what public purpose his property was taken, particularly as at that point it will be clear that it was taken by mistake and inadvertence, and for no ascertainable "public use".

It is only realistic to assume that in many cases, claimants will quite naturally prefer to have their own property back, rather than any sort of "just compensation" for it. That would surely be the attitude of many American firms and individuals, with respect to their interests in foreign ventures.

POINT III.

The denial of the right of an alien to have the courts determine his status as a friendly or enemy alien is contrary to the Treaties of Friendship.

The case is a microcosm, wherein can be discussed the course of the international relations of the United States, as expressed in treaties of friendship and commerce. The alien seeking the protection of the courts, in this case, is a corporation organized and existing under the laws of Switzerland. With Switzerland, the United States has had a treaty of friendship and commerce since November 25, 1850 (11 Stat. 587), ratified November 8, 1855. The purposes of this first treaty with Switzerland are stated by Arthur Nussbaum in an article "American-Swiss Private International Law," 47 Col. L. Rev. 187 (1947), as follows:

> "The motives behind the Convention were political as well as commercial. In 1848 Switzerland had adopted a democratic and federative constitution on the American model, defying the hostile attitude of the autocratic governments of Austria, France, Prussia and Russia.[4] The Government of the United States wanted to give moral support to the democratic cause. As President Furrer of the Swiss Confederacy put it in a message to the Swiss Federal Assembly, President Taylor of the United States wished to extend to Switzerland 'a fraternal hand in the very midst of the storms with which she was threatened, and to offer her a treaty of friendship whereby the two freest peoples on earth will treat each other reciprocally on a footing of equality.'[5] A most-favored-nation clause which was embodied in the Treaty set

up a barrier against the engulfment of Switzerland in the German *Zollverein* or any other exclusive economic system.[6]

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[4] 5 Miller [Treaties and Other International Acts of the United States of America (1937)], at 859.

[5] *Id.* at 865.

[6] *Id.* at 860-62. The American 'special agent' who rendered this report, Mr. Ambrose Dudley Mann, also mentioned that by virtue of the Treaty 'our countrymen who shall visit the Old World may find a home in its centre where they will be as well protected in their persons and their property as if they were residing in their own native land.' *Id.* at 862."

The rights of Swiss nationals are defined in Article I of the treaty of friendship above referred to, which has been in effect for nearly one hundred years. Article I of that treaty reads as follows:

"Article I (The citizens of Switzerland)

"They shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens • • •

"No pecuniary or other more burdensome condition shall be imposed • • • upon the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject." 11 Stat. 587.

By no stretch of the imagination can the contentions of the Custodian in regard to the property of this Swiss national be reconciled with this treaty obligation.

This nation has espoused the project of securing from other nations in the world a general adherence to those specific safeguards of individual liberty which are called

our Bill of Rights. Unless we are punctilious in our own observation of those rights where aliens and their property within the United States are concerned, our voice will carry but little authority on this point with the United Nations.

It is apparently not safe to assume that a scrupulous regard for the interests of aliens, will be found in administrative agencies. They are prone to expand their own powers and prerogatives. The larger interest of this nation, with which the *Amicus* is most concerned, is in the preservation of its reputation for integrity and even liberality in living up to its engagements, generally and in this particular field of alien interests within this government's jurisdiction. Nor is this interest purely ethical or academic, since the observance of such equitable rules will set a good example, and departures from it, on whatever specious grounds, will likewise set a bad example, which debtor nations will doubtless find it to their immediate advantage to follow. Reprisal and retaliation upon American interests abroad, or even simple imitation of a negative and legalistic interpretation of our undertakings, would mean serious damage to the solidity of our international investment position, and would set up a critical obstacle to its expansion. In the present state of our world economy, it is extremely doubtful whether the economic adjustments which need to be made, can be made in time—but it is very obvious that the assurance of integrity in international investment is a necessary element in any such process, if it is to succeed.

It is not too much to say that the attitude of this Court in the disposition of this appeal, may well contribute, either one way or the other, to success or failure in solving this problem of adjustment. The well-considered, traditional phrases of our treaties of friendship and commerce, taken at their face value, are an excellent pattern

for a constructive attitude as to the interests of aliens within our jurisdiction, and reciprocally, as to our interests within their power.

POINT IV.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

WM. HARVEY REEVES,
Counsel for Amicus Curiae
The National Foreign Trade
Council, Inc.

CHARLES R. CARROLL.

FILE COPY

Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934. 35

TOM C. CLARK, Attorney-General, as Successor to the Alien Property Custodian,

Petitioner,

v.

UEBERSEE FINANZ KORPORATION, A. G.,

Respondent.

Motion of The National Foreign Trade Council, Inc., for Leave to File a Brief *Amicus Curiae*.

To the Honorable the Justices of the Supreme Court of the United States:

THE NATIONAL FOREIGN TRADE COUNCIL, INC., respectfully moves:

That this Court grant leave to it to file a brief *amicus curiae* in the above-entitled case now before it by reason of a writ of certiorari to the Court of Appeals for the District of Columbia, duly granted by this Court on February 17, 1947, and in the hearing and determination of this case this Court consider the said brief in favor of the affirmance of the decision of the said Court of Appeals (158 F. 2nd 313). The Petitioner, Tom C. Clark, Attorney-General, has given his written consent to the submission of this brief; the Respondent, Uebersee Finanz Korporation, A. G., has not given its consent.

Since its founding in 1914, the National Foreign Trade Council, Inc., 26 Beaver Street, New York City, has served as an agency of American business in promoting and protecting the full range of American foreign commercial operations.

The nationwide membership consists of American business enterprises, encompassing firms in the export and import trades and services, owners of industrial enterprises and other properties located in foreign countries, banks, insurance companies, agricultural interests, ocean, air and railroad transportation, communications, and additional varieties of American enterprises doing business with or in foreign countries.

The issue in this case is whether or not an alien corporation admittedly organized under the laws of a non-enemy country has the right of recourse to our courts to reclaim property vested by the Alien Property Custodian.

The interest of the National Foreign Trade Council, Inc. is in the effect which a decision in this case must inevitably have on United States trade with all countries of the world with which the United States now does business or hopes to do business in the future. The Court is called upon to interpret a federal statute and define its applicability to certain alien property within the United States and in so doing must find and apply the policy of the United States in respect to all alien held property. Whatever policy is thus tacitly announced through the Court's decision here will be read and examined throughout the world. The affirmance or reversal of the decision of the Court of Appeals now to be reviewed by this Court will be accepted as a policy determination of the greatest creditor nation in the world and the decision will doubtless

be the cause of, or excuse for, affirmative action in other countries in respect to American properties there situated either in emulation or in retaliation. Thus a decision in this case is of great importance to the membership of the Association all of whom are concerned with foreign trade, and collaterally with foreign investments.

The brief, permission for the filing of which is sought by this motion, will point out that this Association has consistently been interested in the questions raised in this case and believes that a decision relative to these questions will, because of probable effect on the course of the foreign trade of this country, be of national importance.

WM. HARVEY REEVES,
Counsel for The National Foreign Trade Council, Inc.

CHARLES R. CARROLL.

p. 7.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1947.

Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, Petitioner,
v.
Uebersee Finanz-Korporation, A. G.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[December 8, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent brought this suit to reclaim property which the Alien Property Custodian[1] acting under § 5 (b) of the Trading With the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1, as amended by the First War Powers Act of 1941, 55 Stat. 839, 50 U. S. C. App. Supp. V, § 5 (b), had vested in himself. Respondent is a corporation organized under the laws of Switzerland and having its principal place of business in that country. The property seized consisted of shares of stock in corporations organized under the laws of various States of this nation and of an interest in a contract between two such corporations.

The complaint alleges that respondent is not an enemy or ally of an enemy and that at no time at or since the vesting has the property in question been owned or controlled, directly or indirectly, in whole or in part, by an enemy, ally of an enemy, or a national of a designated enemy country. It also alleges that none of the property has been owing or belonging to or held on account of or for the benefit of any such person or interest. We construe these allegations to mean that the property is free

[1] The powers and functions of the Custodian were subsequently transferred to the Attorney General. Executive Order No. 9788, 11 Fed. Reg. 11981 (Oct. 14, 1946).

of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has any interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy. Those allegations, as so construed, are indeed taken as true for the purposes of the present ruling, since petitioner's motion to dismiss is based solely on the fact that respondent is a national of a foreign country.

The District Court granted petitioner's motion to dismiss. The Court of Appeals reversed, one justice dissenting. 158 F. 2d 313. The case is here on petition for a writ of certiorari which we granted because of the importance of the question in the administration of the Act. 330 U. S. 813.

Under the Act as it read prior to the 1941 amendment respondent would have been able to maintain this suit on a showing, without more, that it was a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation or any of its allies. That result would be reached as follows: Sec. 7 (c) permitted seizure by the Custodian only of property in which an enemy or ally of an enemy had an interest. Sec. 9 (a) permitted "any person not an enemy or ally of enemy" claiming an interest in any seized property to sue to reclaim it. And the Court held in *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, that a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation or any of its allies[2]

[2] Sec. 2 provides:

"That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that

could maintain such a suit even though the corporation was enemy owned or controlled. The scheme of the Act as it was then drawn was "to seize the shares of stock when enemy owned rather than to take over the corpo-

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occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'

"The words, 'ally of enemy,' as used herein, shall be deemed to mean—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident, or whefever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.'".

rate property." *Hamburg-American Co.* v. *United States*, 277 U. S. 138, 140.

That was at least one respect in which the Act had a "rigidity and inflexibility" that was sought to be cured by the amendment to § 5 (b) in 1941. See H. R. Rep. No. 1507, 77th Cong., 1st Sess., p. 3. It was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral. They had through numerous devices, including the corporation, acquired indirect control or ownership in industries in this country for the purposes of economic warfare.[3] Sec. 5 (b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him "any property or interest of any foreign country or national thereof."[4] The prop-

[3] Some of the uses of the corporation in promotion of these subversive projects are summarized in Administration of the Wartime Financial and Property Controls of the United States Government, Treasury Dept. (1942), pp. 29–30. It is pointed out that technical legal title "to some of the most dangerous of the Axis-influenced enterprises may be Swiss, Dutch, Swedish or American." It is also said that "Actual ownership of business enterprises frequently runs through tangled mazes of holding companies. These holding companies were normally incorporated in neutral countries and the ownership of the holding companies themselves was normally represented by bearer shares, making it extremely difficult to negate a claim that the ownership of the corporation was coincident with the state of incorporation."

[4] Sec. 5 (b) (1), as amended, also granted the President the power to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States . . . ."

Sec. 5 (b) (1), as amended, further provided as respects property which had been vested that "upon such terms and conditions as

erty of all foreign interests was placed within reach of the vesting power not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts.

Thus the President acquired new "flexible powers" (H. R. Rep. No. 1507, *supra*, p. 3) to deal effectively with property interests which had either an open or concealed enemy taint.

While the scope of the President's power was broadened, there was no amendment restricting the scope of § 9 (a). As we have noted, § 9 (a) granted "any person not an enemy or ally of enemy," claiming an interest in property seized, the right to reclaim it. So the provision reads today. Yet, as petitioner suggests, if *Behn, Meyer & Co.* v. *Miller*, *supra*, is applied despite the 1941 amendment, § 9 (a) will undo much of the good which the 1941 amendment to § 5 (b) was designed to accomplish. All a corporate claimant would need do to recover the property seized would be to show that it was organized in this country or in some friendly or neutral country and was not doing business within the territory of an enemy or any of its allies.[5] The fact that it was owned or controlled by enemy interests and might sap the strength of this nation through economic warfare would be immaterial. We agree that a construction so destructive of the objectives of the 1941 amendment to § 5 (b) must be rejected.

Petitioner therefore suggests that once the seizure is shown to be permissible under § 5 (b), there is no remedy for the return of the property under § 9 (a). It is said that § 9 (a) was designed to provide an ultimate judicial determination of the question whether the property seized was within the vesting power defined in § 5 (b). *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 567–568. The argu-

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the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States . . . ."

[5] See note 2, *supra*.

ment accordingly is that since § 5 (b) allows seizure and vesting of "any property or interest of any foreign country or national thereof," a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.

That is to make the right to sue run not to "any person not an enemy or ally of enemy" as § 9 (a) in terms provides but to "any person not an enemy or ally of enemy or national of any foreign country." That would wipe out all suits to reclaim property brought by any foreign interest, no matter how friendly. We stated in *Markham v. Cabell*, 326 U. S. 404, 410–411, "The right to sue, explicitly granted by § 9 (a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission." Such a drastic contraction, if not complete sterilization, of § 9 (a) as petitioner suggests should therefore be made only if no other alternative is open.

There are several reasons which make us hesitate to take that course. In the first place, as we have suggested, the phase of the problem with which we are presently concerned and with which Congress was wrestling when it amended the Act in 1941 started and ended with property having an enemy taint. We find not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis. Those interests were not waging economic warfare against us. Secondly, we are dealing here with the power "to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States."[6] Sen. Rep. No. 911, 77th Cong., 1st Sess., p. 2. It is hard for us to assume that Congress adopted that

[6] As to the powers of the custodian or other agency designated by the President over the property, see § 5 (b) (1), *supra* note 4, and § 12.

drastic course in the case of friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control. Our hesitation is, moreover, increased when we note that § 7 (c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment.

The problem is not without its difficulties whichever way we turn. But we think that we adhere more closely to the policy of both § 5 (b) as amended and § 9 (a), if we do not carry over into the amended Act the consequences of *Behn, Meyer & Co.* v. *Miller, supra.*

As we have observed, the scheme of the Act when *Behn, Meyer & Co.* v. *Miller* was decided was to respect the corporate form, even though the enemy held all the stock of the corporate claimant. *Hamburg-American Co.* v. *United States, supra.* The 1941 amendment to § 5 (b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse. Congress did not, however, alter the definitions of enemy or of ally of enemy contained in § 2. They remain the same as they were at the time *Behn, Meyer & Co.* v. *Miller* was decided.[7]

Yet if the question were presented for the first time under the amended Act, we could not confine the statutory definitions of enemy or ally of enemy to the narrow categories indicated by *Behn, Meyer & Co.* v. *Miller.* To do so would be to run counter to the policy of the Act and be disruptive of its purpose. We are dealing with

[7] See note 2, *supra.*

hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible. *Markham v. Cabell, supra.* So if the definitions contained in § 2[8] are to be harmonized with the policy underlying § 5 (b) and § 9 (a) of the amended Act, we would have to say that they are merely illustrative, not exclusionary. To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.

There is perhaps in logic some basis for saying that that should be the consequence, since Congress did not amend § 2 when it revised the Act by its amendment of § 5 (b). The argument is that the only change effected was in § 5 (b) and that § 2 which stands unamended should be taken to mean what it meant before 1941. But the answer to our problem cannot be had by the use of logic alone. We are dealing here with conflict and confusion in the statute. Though neither § 2 nor § 9 (a) was amended with § 5 (b) in 1941, one of them must be read differently after than before that event. We believe it is more consonant with the functions sought to be served by the Act to apply § 2 differently than it was previously applied than to read § 9 (a) more restrictively. We believe a more harmonious reading of § 2, § 5 (b) and § 9 (a) is had if the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission and which does not make § 9 (a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible connection with the enemy.

It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is

[8] See note 2, *supra.*

said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative[9] or judicial clarification.

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

[9] See Pub. L. 322, 79th Cong., 2d Sess., adding § 32 (a) (2) (E) to the Act.